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THE HISTORY OF THE Common Law OF ENGLAND.

Divided into Twelve Chapters.

Written by a Learned Hand.

Ἰσχυρὸν ὁ ΝΟΜΟΣ ἐστὶν ἄρχοντα.

In the SAVOY:
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THE

THE HISTORY OF THE Common Law OF ENGLAND.

CHAP. I.

Concerning the Distribution of the Laws of England *into Common Law, and Statute Law. And First, concerning the Statute Law, or Acts of Parliament.*

THE Laws of *England* may aptly enough be divided into Two Kinds, *viz. Lex Scripta*, the written Law; and *Lex non Scripta*, the unwritten Law: For although (as shall be shewn hereafter) all the Laws of this Kingdom have some Monuments or Memorials there-

The Kinds of Laws.

thereof in Writing, yet all of them have not their Original in Writing; for some of those Laws have obtain'd their Force by immemorial Usage or Custom, and such Laws are properly called *Leges non Scriptæ*, or unwritten Laws or Customs.

1. *Leges non Scriptæ.*

Those Laws therefore that I call *Leges Scriptæ*, or written Laws, are such as are usually called *Statute Laws*, or Acts of Parliament, which are originally reduced into Writing before they are enacted, or receive any binding Power, every such Law being in the first Instance formally drawn up in Writing, and made, as it were, a *Tripartite Indenture*, between the King, the Lords and the Commons; for without the concurrent Consent of all those Three Parts of the Legislature, no such Law is, or can be made: But the Kings of this Realm, with the Advice and Consent of both Houses of Parliament, have Power to make New Laws, or to alter, repeal, or enforce the Old. And this has been done in all Succession of Ages.

2. *Leges Scriptæ.*

Statute Laws of Two Kinds.

Now *Statute Laws*, or Acts of Parliament, are of Two Kinds, *viz.* First, Those Statutes which were made *before Time of Memory*; and, Secondly, Those Statutes which were made *within* or *since Time of Memory*; wherein observe, That according to a juridical Account and legal Signification, *Time within Memory* is the Time of Limitation in a Writ of Right; which by the Statute of *Westminster* 1. *cap.* 38. was settled, and reduced to the Beginning of the Reign of King *Richard* I. or *Ex primâ Coronatione Regis Richardi Primi*,

Time of Memory.

Primi, who began his Reign the 6th of *July* 1189, and was crown'd the 3d of *September* following: So that whatsoever was before that Time, is *before* Time of Memory; and what is since that Time, is, in a legal Sense, said to be *within* or since the Time of Memory.

And therefore it is, that those Statutes or Acts of Parliament that were made before the beginning of the Reign of King *Richard* I. and have not since been repealed or altered, either by contrary Usage, or by subsequent Acts of Parliament, are now accounted Part of the *Lex non Scripta*, being as it were incorporated thereinto, and become a Part of the Common Law; and in Truth, such Statutes are not now pleadable as Acts of Parliament, (because what is *before* Time of Memory is supposed without a Beginning, or at least such a Beginning as the Law takes Notice of) but they obtain their Strength by meer immemorial Usage or Custom.

Ancient Statutes.

And doubtless, many of those Things that now obtain as Common Law, had their Original by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; though those Acts are now either not extant, or if extant, were made before Time of Memory; and the Evidence of the Truth hereof will easily appear, for that in many of those old Acts of Parliament that were made before Time of Memory, and are yet extant, we may find many of those Laws enacted which

now obtain meerly as Common Law, or the General Custom of the Realm: And were the rest of those Laws extant, probably the Footsteps of the Original Institution of many more Laws that now obtain meerly as Common Law, or Customary Laws, by immemorial Usage, would appear to have been at first Statute Laws, or Acts of Parliament.

Of Two Periods. Those ancient Acts of Parliament which are ranged under the Head of *Leges non Scriptæ*, or Customary Laws, as being made before Time of Memory, are to be considered under Two Periods: *Viz.* First, Such as were made before the coming in of King *William* I. commonly called, *The Conqueror*; or, Secondly, Such as intervened between his coming in, and the beginning of the Reign of *Richard* I. which is the legal Limitation of Time of Memory.

1. Before K. *W.* 1. The former Sort of these Laws are mentioned by our ancient Historians, especially by *Brompton*, and are now collected into one Volume, by *William Lambard* Esq; in his *Tractatus de priscis Anglorum Legibus*, being a Collection of the Laws of the Kings, *Ina*, *Alfred*, *Edward*, *Athelstane*, *Edmond*, *Edgar*, *Ethelred*, *Canutus*, and of *Edward the Confessor*; which last Body of Laws, compiled by *Edward the Confessor*, as they were more full and perfect than the rest, and better accommodated to the then State of Things, so they were such whereof the *English* were always very zealous, as being the great Rule and Standard of their Rights

Rights and Liberties: Whereof more hereafter.

The second Sort are those Edicts, Acts of Parliament, or Laws, that were made after the coming in of King *William*, commonly named, *The Conqueror*, and before the beginning of the Reign of King *Richard* I. and more especially are those which follow; whereof I shall make but a brief Remembrance here, because it will be necessary in the Sequel of this Discourse (it may be more than once) to resume the Mention of them; and besides, Mr. *Selden*, in his Book called, *Janus Anglorum*, has given a full Account of those Laws; so that at present it will be sufficient for me, briefly to collect the Heads or Divisions of them, under the Reigns of those several Kings wherein they were made, *viz.* 2. From *W.* 1. to *R.* 1.

First, The Laws of King *William* I. These consisted in a great Measure of the Repetition of the Laws of King *Edward the Confessor*, and of the enforcing them by his own Authority, and the Assent of Parliament, at the Request of the *English*; and some new Laws were added by himself with the like Assent of Parliament, relating to Military Tenures, and the Preservation of the publick Peace of the Kingdom; all which are mention'd by Mr. *Lambart*, in the Tractate before-mentioned, but more fully by Mr. *Selden*, in his Collections and Observations upon *Eadmerus*. *K. W.* 1.

Secondly, We find little of new Laws after this, till the Time of King *Henry* I. who *K. H.* 1.

besides the Confirmation of the Laws of the Confessor, and of King *William* I. brought in a new Volume of Laws, which to this Day are extant, and called the *Laws* of King *Henry* I. The entire Collection of these is entered in the Red Book of the *Exchequer*, and from thence are transcribed and published by the Care of Sir *Roger Twisden*, in the latter End of Mr. *Lambart's* Book before-mention'd; what the Success of those Laws were in the Time of King *Stewen*, and King *Henry* II. we shall see hereafter: But they did not much obtain in *England*, and are now for the most Part become wholly obsolete, and in Effect quite antiquated.

K. H. 2. *Thirdly*, The next considerable Body of Acts of Parliament, were those made under the Reign of King *Henry* II. commonly called, *The Constitutions of* Clarendon; what they were, appears best in *Hoveden* and *Mat. Paris*, under the Years of that King. We have little Memory else of any considerable Laws enacted in this King's Time, except his Assizes, and such Laws as related to the Forests; which were afterwards improv'd under the Reign of King *Richard* I. But of this hereafter, more at large.

And this shall serve for a short Instance of those Statutes, or Acts of Parliament, that were made *before Time of Memory*; whereof, as we have no Authentical Records, but only Transcripts either in our ancient Historians, or other Books and Manuscripts; so they being Things done before Time of Memory, obtain at this Day no further than as by Usage and Custom they are,

are, as it were, engrafted into the Body of the Common Law, and made a Part thereof.

And now I come to those *Leges Scriptæ*, or Acts of Parliament, which were made since or within the Time of Memory, *viz.* Since the beginning of the Reign of *Richard* I. and those I shall divide into Two General Heads, *viz.* Those we usually call the *Old* Statutes, and those we usually call the *New* or later Statutes: And because I would prefix some certain Term or Boundary between them, I shall call those the *Old* Statutes which end with the Reign of King *Edward* II. and those I shall call the *New* or later Statutes which begin with the Reign of King *Edward* III. and so are derived through a Succession of Kings and Queens down to this Day, by a continued and orderly Series. *Leges Scriptæ*: Two Kinds. Old Statutes.

Touching these later Sort I shall say nothing, for they all keep an orderly and regular Series of Time, and are extant upon Record, either in the Parliament Rolls, or in the Statute Rolls of King *Edward* III. and those Kings that follow: For excepting some few Years in the beginning of K. *Edward* III. *i. e.* 2, 3, 7, 8 & 9 *Edw.* 3. all the Parliament Rolls that ever were since that Time have been preserved, and are extant; and, for the most Part, the Petitions upon which the Acts were drawn up, or the very Acts themselves. Later Statutes.

Now therefore touching the elder Acts of Parliament, *viz.* Those that were made between the First Year of the Reign of K. *Richard* I. and the last Year of K. *Edward* II. Old Statutes in the Time of K. R. 1.

we have little extant in any authentical History; and nothing in any authentical Record touching Acts made in the Time of K. *Rich.* I. unless we take in those Constitutions and Assizes mentioned by *Hoveden* as aforesaid.

K. *Rich.* 1.

Neither is there any great Evidence, what Acts of Parliament pass'd in the Time of King *John*, tho' doubtless many there were both in his Time, and in the Time of K. *Rich.* I. But there is no Record extant of them, and the *English* Histories of those Times give us but little Account of those Laws; only *Matthew Paris* gives us an Historical Account of the *Magna Charta*, and *Charta de Foresta*, granted by King *John* at *Running Mead* the 15th of *June*, in the Seventeenth Year of his Reign.

K. *John.*

His two Charters.

And it seems, that the Concession of these Charters was in a Parliamentary Way; you may see the Transcripts of both Charters *verbatim* in *Mat. Paris*, and in the Red Book of the *Exchequer*. There were seven Pair of these Charters sent to some of the Great Monasteries under the Seal of King *John*, one Part whereof sent to the *Abby* of *Tewkesbury* I have seen under the Seal of that King; the Substance thereof differs something from the *Magna Charta*, and *Charta de Foresta*, granted by King *Hen.* III. but not very much, as may appear by comparing them.

Granted in a Parliamentary Way.

But tho' these Charters of King *John* seem to have been passed in a kind of Parliament, yet it was in a Time of great Confusion between that King and his Nobles; and there-

fore

fore they obtained not a full Settlement till the Time of King *Hen.* III. when the Substance of them was enacted by a full and solemn Parliament.

I therefore come down to the Times of those succeeding Kings, *Hen.* III. *Edw.* I. and *Edw.* II. and the Statutes made in the Times of those Kings, I call the *Old Statutes*; partly because many of them were made but in Affirmance of the Common Law; and partly because the rest of them, that made a Change in the Common Law, are yet so ancient, that they now seem to have been as it were a Part of the Common Law, especially considering the many Expositions that have been made of them in the several Successions of Times, whereby as they became the great Subject of Judicial Resolutions and Decisions; so those Expositions and Decisions, together also with those old Statutes themselves, are as it were incorporated into the very Common Law, and become a Part of it. Old Statutes.

In the Times of those three Kings last mentioned, as likewise in the Times of their Predecessors, there were doubtless many more Acts of Parliament made than are now extant of Record, or otherwise, which might be a Means of the Change of the Common Law in the Times of those Kings from what it was before, tho' all the Records or Memorials of those Acts of Parliament introducing such a Change, are not at this Day extant: But of those that are extant, I shall give you a brief Account,

not

not intending a large or accurate Treatise touching that Matter.

K. H. 3. The Reign of *Hen.* III. was a troublesome Time, in respect of the Differences between him and his Barons, which were not composed till his 51st Year, after the Battle of *Evesham*. In his Time there were many Parliaments, but we have only one Summons of Parliament extant of Record in his Reign, *viz.* 49 *Hen.* III. and we have but few of those many Acts of Parliament that passed in his Time, *viz.* The great Charter, and *Charta de Foresta*, in the Ninth Year of his Reign, which were doubtless pass'd in Parliament; the Statute of *Merton*, in the 20th Year of his Reign; the Statute of *Marlbridge*, in the 52d Year; and the *Dictum sive Edictum de Kenelworth*, about the same Time; and some few other old Acts.

K. E. 1. In the Time of K. *Edw.* I. there are many more Acts of Parliament extant than in the Time of K. *Hen.* III. Yet doubtless, in this King's Time, there were many more Statutes made than are now extant: Those that are now extant, are commonly bound together in the old Book of *Magna Charta*. By *those Statutes*, great Alterations and Amendments were made in the Common Law; and by those that are now extant, we may reasonably guess, that there were considerable Alterations and Amendments made by those that are not extant, which possibly may be the real, tho' sudden Means of the great Advance and Alteration of the Laws of *England* in the King's Reign, over what

what they were in the Time of his Predeceſſors.

The firſt Summons of Parliament that I remember extant of Record in this King's Time, is 23 *Edw.* 1. tho' doubtleſs there were many more before this, the Records whereof are either loſt or miſlaid: For many Parliaments were held by this King before that Time, and many of the Acts paſs'd in thoſe Parliaments are ſtill extant; as, the Statutes of *Weſtminſter* 1. in the 3d of *Edw.* 1. The Statutes of *Glouceſter*, 6 *Edw.* 1. The Statutes of *Weſtminſter* 2. and of *Winton*, 13 *Edw.* 1. The Statutes of *Weſtminſter* 3. and of *Quo Warranto*, 18 *Edw.* 1. And divers others in other Years, which I ſhall have Occaſion to mention hereafter.

In the Time of K. *Edw.* II. many Parliaments were held, and many Laws were enacted; but we have few Acts of Parliament of his Reign extant, eſpecially of Record. K. E. 2.

" The Statutes of this King's Reign which " are in Print, are theſe, *viz.* The Statutes " *De Militibus, & de Frangentibus Priſonas*, " 1 *Edw.* 2. *Articuli Cleri*, 9 *Edw.* 2. *De* " *Gaveletto* in *London*, 10 *Edw.* 2. The Sta- " tutes of *York*, of Eſſoins and View of Land, " 12 *Edw.* 2. *Weſtminſter* 4. 13 *Edw.* 2. Of " Eſtreats, 15 *Edw.* 2. *Prerogativa Regis*, " 17 *Edw.* 2. tho' ſome think this Statute " to be made *Temp. Edw.* 1. The Statute " of Homage, and the Statute *De Terris* " *Templariorum*, alſo 17 *Edw.* 2. View of " Frankpledge, 18 *Edw.* 2. And divers other " Sta-

" Statutes in this King's Reign, but of un-
" certain Time.

I And now, because I intend to give some short Account of some general Observations touching Parliaments, and of Acts of Parliament pass'd in the Times of those three Princes, *viz.* *Hen.* III. *Edw.* I. and *Edw.* II. because they are of greatest Antiquity, and therefore the Circumstances that attended them most liable to be worn out by Process of Time, I will here mention some Particulars relating to them to preserve their Memory, and which may also be useful to be known in relation to other Things.

Parliamentary Records.

We are therefore to know, That there are these several Kinds of Records of Things done in Parliament, or especially relating thereto, *viz.* 1. The Summons to Parliament. 2. The Rolls of Parliament. 3. Bundles of Petitions in Parliament. 4. The Statutes, or Acts of Parliament themselves. And, 5. The *Brevia de Parliamento*, which for the most Part were such as issued for the Wages of Knights and Burgesses; but with these I shall not meddle.

Summons to Parliament.

First, As to the Summons to Parliament. These Summons to Parliament are not all entred of Record in the Times of *Hen.* III. and *Edw.* I. none being extant of Record in the Time of *Hen.* III. but that of 49 *Hen.* 3. and none in the Time of *Edw.* I. till the 23 *Edw.* 1. But after that Year, they are for the most part extant of Record, *viz.* *In Dorso*

Dorso Claus' Romanorum, in the Backside of the Close Rolls.

Secondly, As to the Rolls of Parliament, *viz.* The Entry of the several Petitions, Answers and Transactions in Parliament. Those are generally and successively extant of Record in the *Tower*, from 4 *Edw.* 3. downward till the End of the Reign of *Edw.* IV. Excepting only those Parliaments that intervened between the 1st and the 4th, and between the 6th and the 11th, of *Edw.* III. Rolls of Parliament.

But of those Rolls in the Times of *Hen.* III. and *Edw.* I. and *Edw.* II. many are lost, and few extant; also, of the Time of *Hen.* III. I have not seen any Parliament Roll; and all that I ever saw of the Time of *Edw.* I. was one Roll of Parliament in the Receipt of the *Exchequer* of 18 *Edw.* 1. and those Proceedings and Remembrances which are in the *Liber placitor' Parliamenti* in the *Tower*, beginning as I remember with the 20th Year of *Edw.* I. and ending with the Parliament of *Carlisle*, 35 *Edw.* 1. And not continued between those Years with any constant Series; but including some Remembrances of some Parliaments in the Time of *Edw.* I. and others in the Time of *Edw.* II. Many lost, &c.

In the Time of *Edw.* II. besides the *Rotuli Ordinationum*, of the Lords Ordoners, about 7 *Edw.* 2. we have little more than the Parliament Rolls of 7 & 8 *Edw.* 2. and what others are interspersed in the Parliament Book of *Edw.* I. above-mention'd, and, as I remember, some short Remembrances.

ces of Things done in Parliament in the 19 *Edw.* 3.

Bundles of Petitions. *Thirdly*, As to the Bundles of Petitions in Parliament: They were for the most part Petitions of private Persons, and are commonly endorsed with Remissions to the several Courts where they were properly determinable. There are many of those Bundles of Petitions, some in the Times of *Edw.* I. and *Edw.* II. and more in the Times of *Edw.* III. and the Kings that succeeded him.

Acts, or Statutes. *Fourthly*, The Statutes, or Acts of Parliament themselves. These seem, as if in the Time of *Edw.* I. they were drawn up into the Form of a Law in the first Instance, and so assented to by both Houses, and the King, as may appear by the very Observation of the Contexture and Fabrick of the Statutes of those Times. But from near the beginning of the Reign of *Edw.* III. till very near the end of *Hen.* VI. they were not in the first Instance drawn up in the Form of Acts of Parliament; but the Petition and the Answer were entred in the Parliament Rolls, and out of both, by Advice of the Judges and others of the King's Council, the Act was drawn up conformable to the Petition and Answer, and the Act it self for the most part entred in a Roll, called, *The Statute Roll*, and the Tenor thereof affixed to Proclamation Writs, directed to the several Sheriffs to proclaim it as a Law in their respective Counties.

Manner of Passing anciently.

And of later Times. But because sometimes Difficulties and Troubles arose, by this extracting of the Statute

tute out of the Petition and Answer; about the latter end of *Hen.* VI. and beginning of *Edw.* IV. they took a Course to reduce 'em, even in the first Instance, into the full and compleat Form of Acts of Parliament, which was prosecuted (or Entred) commonly in this Form: *Item quædam Petitio exhibita fuit in hoc Parliamento formam actus in se continens, &c.* and abating that Stile, the Method still continues much the same, namely; That the entire Act is drawn up in Form, and so comes to the King for his Assent.

The ancient Method of passing Acts of Parliament being thus declared, I shall now give an Account touching those Acts of Parliament that are at this Day extant of the Times of *Hen.* III. *Edw.* I. and *Edw.* II. and they are of two Sorts, *viz.* Some of them are extant of Record; others are extant in ancient Books and Memorials, but not of Record. And those which are extant of Record, are either Recorded in the proper and natural Roll, *viz. the Statute Roll*; or they are entred in some other Roll, especially in the *Close Rolls* and *Patent Rolls*, or in both. Those that are extant, but not of Record, are such as tho' they have no Record extant of them, but possibly the same is lost; yet they are preserved in ancient Books and Monuments, and in all Times have had the Reputation and Authority of Acts of Parliament.

Statutes extant.

Two Sorts.

1. Of Record.

For an Act of Parliament made within Time of Memory, loses not its being so,

because not extant of Record, especially if it be a general Act of Parliament. For of general Acts of Parliament, the Courts of Common Law are to take Notice without pleading of them; and such Acts shall never be put to be tried by the Record, upon an Issue of *Nul tiel Record*, but it shall be tried by the Court, who, if there be any Difficulty or Uncertainty touching it or the right Pleading of it, are to use for their Information ancient Copies, Transcripts, Books, Pleadings and Memorials to inform themselves, but not to admit the same to be put in Issue by a Plea of *Nul tiel Record*.

1. Not of Record.

For, as shall be shewn hereafter, there are very many old Statutes which are admitted and obtain as such, tho' there be no Record at this Day extant thereof, nor yet any other written Evidence of the same, but what is in a manner only Traditional, as namely, Ancient and Modern Books of Pleadings, and the common received Opinion and Reputation, and the Approbation of the Judges Learned in the Laws: For the Judges and Courts of Justice are, *ex Officio*, (bound) to take Notice of publick Acts of Parliament, and whether they are truly pleaded or not, and therefore they are the Triers of them. But it is otherwise of private Acts of Parliament, for they may be put in Issue, and tried by the Record upon *Nul tiel Record* pleaded, unless they are produced Exemplified, as was done in the *Prince's* Case in my Lord *Cook's* 8th *Rep.* and therefore

therefore the Averment of *Nul tiel Record* was refuſed in that Caſe.

The old Statutes or Acts of Parliament that are of Record, as is before ſaid, are entred either upon the proper Statute Roll, or ſome other Roll in *Chancery*.

The firſt Statute Roll which we have, is in the *Tower*, and begins with *Magna Charta*, and ends with *Edw.* III. and is called *Magnus Rotulus Statutor'*. There are five other Statute Rolls in that Office, of the Times of *Rich.* II. *Hen.* IV. *Hen.* V. *Hen.* VI. and *Edw.* IV. The firſt Statute Roll.

I ſhall now give a Scheme of thoſe ancient Statutes of the Times of *Hen.* III. *Edw.* I. and *Edw.* II. that are recorded in the firſt of thoſe Rolls or elſewhere, to the beſt of my Remembrance, and according to thoſe Memorials I have long had by me, *viz.* Ancient Statutes of Record.

Magna Charta. Magno Rot. Stat. membr. 40. & *Rot. Cartar.* 28 *E.* 1. *membr.* 16.

Charta de Foreſta. Mag. Rot. Stat. memb. 19. & *Rot. Cartar.* 28 *E.* 1. *membr.* 26.

Sat. de Glouceſtre. Mag. Rot. Stat. memb. 47.

Weſtm. 2. *Rot. Mag. Stat. membr.* 47.

Weſtm. 3. *Rot. Clauſo,* 18 *E.* 1. *membr.* 6. *Dorſo.*

Winton. Rot. Mag. Stat. membr. 41. *Rot. Clauſo,* 8 *E.* 3. *membr.* 6. *Dorſo. Pars* 2. *Rot. Clauſo,* 5 *R.* 2. *membr.* 13. *Rot. Paten.* 25 *E.* 1. *membr.* 13.

De Mercatoribus. Mag. Rot. Stat. membr. 47. *In Dorſo.*

De Religioſis. *Mag. Rot. Stat. membr.* 47.

Articuli Cleri. *Mag. Rot. Stat. membr.* 34. *Dorſo* 2 *Pars. Pat. E.* 1. 2. *membr.* 34. 2 *Pars. Pat.* 2 *E.* 3. *membr.* 15.

De hiis qui ponendi ſunt in Aſſiſis. *Mag. Rot. Stat. membr.* 41.

De Finibus levatis. *Mag. Rot. Stat. memb.* 37.

De defenſione Juris liberi Parliam. *Lib. Parl. E.* 1. *fo.* 32.

Stat. Eborum. *Mag. Rot. Stat. membr.* 32.

De conjunctis infeofatis. *Mag. Rot. Stat. membr.* 34.

De Eſcaetoribus. *Mag. Rot. Stat. membr.* 35. *Dorſo, & Rot. Clauſ.* 29 *E.* 1. *membr.* 14. *Dorſo.*

Stat. de Lincolne. *Mag. Rot. Stat. memb.* 32.

Stat. de Priſcis. *Rot. Mag. Stat. membr.* 33. *In Schedula de libertatibus perquirendis, vel Rot. Clauſ.* 27 *E.* 1. *membr.* 24.

Stat. de Acton Burnel. *Rot. Mag. Stat. membr.* 46. *Dorſo, & Rot. Clauſ.* 11 *E.* 1. *membr.* 2.

Juramentum Vicecomit. *Rot. Mag. Stat. membr.* 34. *Dorſo, & Rot. Clauſ.* 5 *E.* 2. *membr.* 23.

Articuli Stat. Glouceſtriæ. *Rot. Clauſ.* 2 *E.* 2. *Pars* 2. *membr.* 8.

De Piſtoribus & Braciatoribus. 2 *Pars Clauſ. vel Pat.* 2 *R.* 2. *membr.* 29.

De aſportatis Religioſor. *Mag. Rot. Stat. membr.* 33.

Weſtm. 4. *De Vicecomitibus & Viridi cæra.* *Rot. Mag Stat. membr.* 33. *In Dorſo.*

Confirmationes Chartarum. *Mag. Rot. Stat. membr.* 28.

De

De Terris Templariorum. Mag. Rot. Stat. memb. 31. *in Dorso, & Claus.* 17 E. 2. *membr.* 4.

Litera patens super prisis bonorum Cleri. Rot. Mag. Stat. membr. 33. *In Dorso.*

De Forma mittendi extractas ad Scaccar. Rot. Mag. Stat. membr. 36. *& membr.* 30. *In Dorso.*

Statutum de Scaccar. Mag. Rot. Stat.

Statutum de Rutland. Rot. Claus. 12 E. 1.

Ordinatio Foreſtæ. Mag. Rot. Stat. memb. 30. *& Rot. Claus.* 17 E. 2. *Pars* 2. *membr.* 3.

According to a ſtrict Inquiry made about 30 Years ſince, theſe were all the old Statutes of the Times of *Hen.* III. *Edw.* I. and *Edw.* II. that were then to be found of Record; what other Statutes have been found ſince, I know not.

Butler's Ordinance.

The Ordinance called *Butlers*, for the Heir to puniſh Waſt in the Life of the Anceſtor, tho' it be of Record in the Parliament Book of *Edw.* I. yet it never was a Statute, nor never ſo received, but only ſome Conſtitution of the King's Council or Lords in Parliament, and which never obtain'd the Strength or Force of an Act of Parliament.

Ancient Statutes not of Record.

Now thoſe Statues that enſue, tho' moſt of 'em are unqueſtionable Acts of Parliament, yet are not of Record that I know of, but only their Memorials preſerved in ancient Printed and Manuſcript Books of Statutes; yet they are at this Day for the moſt part generally accepted and taken as Acts of Parliament tho' ſome of 'em are now antiquated, and of little Uſe, *viz.*

The Statutes of *Merton*, *Marlbridge*, *Westm.* 1. *Explanatio Statuti Glouceſtriæ*, *De Champertio*, *De viſu Frankplegii*, *De pane & Cerviſia*, *Articuli Inquiſitionis ſuper Stat. de Winton*, *Circumſpecte agatis*, *De diſtrictione Scaccarii*, *De Conſpirationibus*, *De vocatis ad Warrant. Statut. de Carliol*, *De Prerogativa Regis*, *De modo faciendi Homag. De Wardis & Releivis Dies Communes in Banco. Stat. de Bigamis*, *Dies communes in Banco in caſu conſimili. Stat. Hiberniæ*, *De quo Warranto*, *De Eſſoin calumpniand. Judicium colliſtrigii*, *De Frangentibus Priſonar'. De malefactoribus in Parcis*, *De Conſultationibus*, *De Officio Coronatoris*, *De Protectionibus*, *Sententia lata ſuper Chartas*, *Modus levandi Fines. Statut. de Gavelet*, *De Militibus*, *De Vaſto*, *De anno Biſſextili*, *De appellatis*, *De Extenta Manerii*, *Compoſitio Menſearum* vel Computatio Menſarum. *Stat. de Quo Warranto*, *Ordinatio de Inquiſitionibus*, *Ordinatio de Foreſta*, *De admenſura Terræ*, *De dimiſſione Denarior. Statut. de Quo Warranto novum*, *Ne Rector proſternat arbores in Cæmeterio*, *Conſuetudines & Aſſiſa de Foreſta*, *Compoſitio de Ponderibus*, *De Tallagio*, *De viſu Terræ & ſervitio Regis*, *Compoſitio ulnarum & particarum*, *De Terris amortizandis*, *Dictum de Kenelworth*, &c.

From whence we may collect theſe Two Obſervations, *viz.*

Firſt, That altho' the Record it ſelf be not extant, yet general Statutes made within Time of Memory, namely, ſince 1° *Richardi Primi*, do not loſe their Strength, if any authentical

thentical Memorials thereof are in Books, and ſeconded with a general received Tradition atteſting and approving the ſame.

Secondly, That many Records, even of Acts of Parliament, have in long Proceſs of Time been loſt, and poſſibly the Things themſelves forgotten at this Day, which yet in or near the Times wherein they were made, might cauſe many of thoſe authoritative Alterations in ſome Things touching the Proceedings and Deciſions in Law: The original Cauſe of which Change being otherwiſe at this Day hid and unknown to us; and indeed, Hiſtories (and Annals) give us an Account of the Suffrages of many Parliaments, whereof we at this Time have none, or few Footſteps extant in Records or Acts of Parliament. The Inſtance of the great Parliament at *Oxford*, about 40th of *Hen.* III. may, among many others of like Nature, be a concurrent Evidence of this: For tho' we have Mention made in our Hiſtories of many Conſtitutions made in the ſaid Parliament at *Oxford*, and which occaſioned much Trouble in the Kingdom, yet we have no Monuments of Record concerning that Parliament, or what thoſe Conſtitutions were.

Many Acts of Parliament loſt.

And thus much ſhall ſerve touching thoſe Old Statutes or *Leges Scriptæ*, or Acts of Parliament made in the Times of thoſe three

Kings, *Hen.* III. *Edw.* I. and *Edw.* II. Those that follow in the Times of *Edw.* III. and the succeeding Kings, are drawn down in a continued Series of Time, and are extant of Record in the Parliament Rolls, and in the Statute Rolls, without any remarkable Omission, and therefore I shall say nothing of them.

CHAP.

CHAP. II.

Concerning the Lex non Scripta, i. e. *The Common or Municipal Laws of this Kingdom.*

IN the former Chapter, I have given you a ſhort Account of that Part of the Laws of *England* which is called *Lex Scripta*, namely, Statutes or Acts of Parliament, which in their original Formation are reduced into Writing, and are ſo preſerv'd in their Original Form, and in the ſame Stile and Words wherein they were firſt made: I now come to that Part of our Laws called, *Lex non Scripta*, under which I include not only General Cuſtoms, or the Common Law properly ſo called, but even thoſe more particular Laws and Cuſtoms applicable to certain Courts and Perſons, whereof more hereafter.

The *Common Law* conſiſts of

General Cuſtoms,

And particular.

And when I call thoſe Parts of our Laws *Leges non Scriptæ*, I do not mean as if all thoſe Laws were only Oral, or communicated from the former Ages to the later, merely by Word. For all thoſe Laws have their ſeveral Monuments in Writing, whereby they are transferr'd from one Age to another, and without which they would ſoon loſe all kind of Certainty: For as the Civil and Canon Laws have their *Reſponſa Prudentum*,

Written in Books, *&c.*

dentum, Consilia & Decisiones, i. e. their Canons, Decrees, and Decretal Determinations extant in Writing; so those Laws of *England* which are not comprized under the Title of Acts of Parliament, are for the most part extant in Records of Pleas, Proceedings and Judgments, in Books of Reports, and Judicial Decisions, in Tractates of Learned Men's Arguments and Opinions, preserv'd from ancient Times, and still extant in Writing.

Hath its Force by Usage.

But I therefore stile those Parts of the Law, *Leges non Scriptæ*, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are; but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matters indeed, and the Substance of those Laws, are in Writing, but the formal and obliging Force and Power of them grows by long Custom and Use, as will fully appear in the ensuing Discourse.

Now the Municipal Laws of this Kingdom, which I thus call *Leges non Scriptæ*, are of a vast Extent, and indeed include in their Generalty all those several Laws which are allowed, as the Rule and Direction of Justice and Judicial Proceedings, and which are applicable to all those various Subjects, about which Justice is conversant. I shall, for more Order, and the better to guide my

my Reader, distinguish them into Two Kinds, *viz.* Is of Two Kinds.

First, The Common Law, as it is taken in its proper and usual Acceptation.

Secondly, Those particular Laws applicable to particular Subjects, Matters or Courts.

1. Touching the former, *viz.* The Common Law in its usual and proper Acceptation. This is that Law by which Proceedings and Determinations in the King's *Ordinary Courts* of Justice are directed and guided. This directs the Course of Discents of Lands, and the Kinds; the Natures, and the Extents and Qualifications of Estates; therein also the Manner, Forms, Ceremonies and Solemnities of transferring Estates from one to another: The Rules of Settling, Acquiring, and Transferring of Properties; The Forms, Solemnities and Obligation of Contracts; The Rules and Directions for the Exposition of Wills, Deeds and Acts of Parliament. The Process, Proceedings, Judgments and Executions of the King's *Ordinary Courts* of Justice; The Limits, Bounds and Extents of Courts, and their Jurisdictions. The several Kinds of *Temporal* Offences, and Punishments at Common Law; and the Manner of the Application of the several Kinds of Punishments, and infinite more Particulars which extend themselves as large as the many Exigencies in the Distri- 1. Common Law. Its Extent.

Distribution of the King's *Ordinary* Justice requires.

And besides these more common and ordinary Matters to which the Common Law extends, it likewise includes the Laws applicable to divers Matters of very great Moment; and tho' by reason of that Application, the said Common Law assumes divers Denominations, yet they are but Branches and Parts of it; like as the same Ocean, tho' it many times receives a different Name from the Province, Shire, Island or Country to which it is contiguous, yet these are but Parts of the same Ocean.

Its Denominations.

Thus the Common Law includes, *Lex Prerogativa*, as 'tis applied with certain Rules to that great Business of the King's Prerogative; so 'tis called *Lex Forestæ*, as it is applied under its special and proper Rules to the Business of Forests; so it is called *Lex Mercatoria*, as it is applied under its proper Rules to the Business of Trade and Comerce; and many more Instances of like Nature may be given: Nay, the various and particular Customs of Cities, Towns and Manors, are thus far Parts of the Common Law as they are applicable to those particular Places, which will appear from these Observations, *viz.*

Its Effects on particular Customs.

First, The Common Law does determine what of those Customs are good and reasonable, and what are unreasonable and void. *Secondly*, The Common Law gives to those Customs that it adjudges reasonable, the Force and Efficacy of their Obligation.

gation. *Thirdly*, The Common Law determines what is that Continuance of Time that is ſufficient to make ſuch a Cuſtom. *Fourthly*, The Common Law does interpoſe and authoritatively decide the Expoſition, Limits and Extenſion of ſuch Cuſtoms.

This Common Law, though the Uſage, Practice and Deciſions of the King's Courts of Juſtice may expound and evidence it, and be of great Uſe to illuſtrate and explain it; yet it cannot be authoritatively altered or changed but by Act of Parliament. But of this Common Law, and the Reaſon of its Denomination, more at large hereafter. Not alterable but by Statute.

Now, *Secondly*, As to thoſe particular Laws I before mentioned, which are applicable to particular Matters, Subjects or Courts: Theſe make up the ſecond Branch of the Laws of *England*, which I include under the general Term of *Leges non Scriptæ*, and by thoſe particular Laws, I mean the Laws Eccleſiaſtical, and the Civil Law, ſo far forth as they are admitted in certain Courts, and certain Matters allow'd to the Deciſion of thoſe Courts, whereof hereafter. 2dly, *Particular Laws*, viz.

It is true, That thoſe Civil and Eccleſiaſtical Laws are indeed Written Laws; The Civil Law being contain'd in their Pandects, and the Inſtitutions of *Juſtinian*, &c. (their Imperial Conſtitutions or Codes anſwering to our *Leges Scriptæ*, or Statutes.) And the Canon or Eccleſiaſtical Laws contained for the moſt part in the Canons and Conſtitutions of Councils and Popes, collected in their 1. Civil. 2. Eccleſiaſtical.

their *Decretum Gratiani*, and the Drecretal Epistles of Popes, which make up the Body of their *Corpus Juris Canonici*, together with huge Volumes of Councils, and Expositions, Decisions, and Tractates of learned Civilians and Canonists, relating to both Laws; so that it may seem at first View very improper to rank these under the Branch of *Leges non Scriptæ*, or Unwritten Laws.

Why accounted *Leges non Scriptæ*.

But I have for the following Reason rang'd these Laws among the Unwritten Laws of *England*, *viz.* because it is most plain, That neither the Canon Law nor the Civil Law have any Obligation as Laws within this Kingdom, upon any Account that the Popes or Emperors made those Laws, Canons, Rescripts or Determinations, or because *Justinian* compiled their *Corpus Juris Civilis*, and by his Edicts confirm'd and publish'd the same as authentical, or because this or that Council or Pope made those or these Canons or Decrees, or because *Gratian*, or *Gregory*, or *Boniface*, or *Clement*, did as much as in them lie authenticate this or that Body of Canons or Constitutions; for the King of *England* does not recognize any Foreign Authority, as superior or equal to him in this Kingdom, neither do any Laws of the Pope or Emperor, as they are such, bind here: But all the Strength that either the Papal or Imperial Laws have obtained in this Kingdom, is only because they have been received and admitted either by the Consent of Parliament, and so are part of the Statute Laws of the Kingdom, or else by

by immemorial Usage and Custom in some particular Cases and Courts, and no otherwise, and therefore so far as such Laws are received and allowed here, so far they obtain, and no further; and the Authority and Force they have here is not founded on, or derived from themselves; for so they bind no more with us than our Laws bind in *Rome* or *Italy*. But their Authority is founded merely on their being admitted and received by us, which alone gives 'em their Authoritative Essence, and qualifies their Obligation.

Allowed by Usage only.

And hence it is, That even in those Courts where the Use of those Laws is indulged according to that Reception which has been allowed 'em: If they exceed the Bounds of that Reception, by extending themselves to other Matters than has been allowed 'em; or if those Courts proceed according to that Law, when it is controuled by the Common Law of the Kingdom: The Common Law does and may prohibit and punish them; and it will not be a sufficient Answer, for them to tell the King's Courts, that *Justinian* or Pope *Gregory* have decreed otherwise. For we are not bound by their Decrees further, or otherwise than as the Kingdom here has, as it were, transposed the same into the Common and Municipal Laws of the Realm, either by Admission of, or by Enacting the same, which is that alone which can make 'em of any Force in *England*. I need not give Particular Instances herein; the Truth thereof is plain

And controul'd by the Common Law.

plain and evident, and we need go no further than the Statutes of 24 *H.* 8. *cap.* 12. 25 *H.* 8. *c.* 19, 20, 21. and the learned Notes of *Selden* upon *Fleta*, and the Records there cited; nor shall I spend much Time touching the Use of those Laws in the several Courts of this Kingdom: But will only briefly mention some few Things concerning them.

3 Courts using the Civil and Comon Law.

There are Three Courts of Note, wherein the Civil, and in one of them the Canon or Ecclesiastical Law, has been with certain Restrictions allowed in this Kingdom, *viz.* 1*st*. The Courts Ecclesiastical, of the Bishops and their derivative Officers. 2*dly*. The Admiralty Court. 3*dly*. The *Curia Militaris*, or Court of the Constable and Marshal, or Persons commissioned to exercise that Jurisdiction. I shall touch a little upon each of these.

1. Ecclesiastical Courts. 2 Kinds.

First, The Ecclesiastical Courts, they are of two Kinds, *viz.* 1*st*. Such as are derived immediately by the King's Commission; such was formerly the Court of High Commission; which tho', without the help of an Act of Parliament, it could not in Matters of Ecclesiastical Cognizance use any Temporal Punishment or Censure, as Fine, Imprisonment, *&c.* Yet even by the Common Law, the Kings of *England*, being delivered from *Papal Usurpation*, might grant a Commission to hear and determine Ecclesiastical Causes and Offences, according to the King's Ecclesiastical Laws, as *Cawdry's* Case, *Cook's* 5th Report. 2*dly*. Such as are

not derived by any immediate Commiſſion from the King; but the Laws of *England* have annexed to certain Offices, Eccleſiaſtical Juriſdiction, as incident to ſuch Offices: Thus every Biſhop by his Election and Confirmation, even before Conſecration, had Eccleſiaſtical Juriſdiction annex'd to his Office, as *Judex Ordinarius* within his Dioceſe; Qr. and divers Abbots anciently, and moſt Archdeacons at this Day, by Uſage, have had the like Juriſdiction within certain Limits and Precincts.

Their Juriſdiction derived from the Crown.

But altho' theſe are *Judices Ordinarii*, and have Eccleſiaſtical Juriſdiction annex'd to their Eccleſiaſtical Offices, yet this Juriſdiction Eccleſiaſtical *in Foro Exteriori* is derived from the Crown of *England*: For there is no External Juriſdiction, whether Eccleſiaſtical or Civil, within this Realm, but what is derived from the Crown: It is true, both anciently, and at this Day, the Proceſs of Eccleſiaſtical Courts runs in the Name, and Iſſues under the Seal of the Biſhop; and that Practice ſtands ſo at this Day, by Vertue of ſeveral Acts of Parliament, too long here to recount. But that is no Impediment of their deriving their Juriſdiction from the Crown; for till 27 *H.* 8. *cap.* 24. the Proceſs in Counties Palatine ran in the Name of the Counts Palatine, yet no Man ever doubted, but that the Palatine Juriſdictions were deriv'd from the Crown.

Touching the Severance of the Biſhops Conſiſtory from the Sheriff's Court: See the

the Charter of King *Will.* I. and Mr. *Selden's* Notes on *Eadmerus.*

Eccleſiaſtical Juriſdiction of Two Kinds.

Now the Matters of Eccleſiaſtical Juriſdiction are of Two Kinds, Criminal and Civil.

1ſt. Criminal.

The Criminal Proceedings extend to ſuch Crimes, as by the Laws of this Kingdom are of Eccleſiaſtical Cognizance; as Hereſie, Fornication, Adultery, and ſome others, wherein their Proceedings are, *Pro Reformatione Morum & pro Salute Animæ*; and the Reaſon why they have Conuzance of thoſe and the like Offences, and not of others, as Murther, Theft, Burglary, *&c.* is not ſo much from the Nature of the Offence (for ſurely the one is as much a Sin as the other, and therefore if their Cognizance were of Offences *quatenus peccata contra Deum*, it ſhould extend to all Sins whatſoever, it being againſt God's Law). But the true Reaſon is, becauſe the Law of the Land has indulged unto that Juriſdiction the Conuzance of ſome Crimes, and not of others.

2d. Civil.

The Civil Cauſes committed to their Cognizance, wherein the Proceedings are *ad Inſtantiam Partis*, ordinarily are Matters of Tythes, Rights of Inſtitution and Induction to Eccleſiaſtical Benefices, Caſes of Matrimony and Divorces, and Teſtamentary Cauſes, and the Incidents thereunto, as Inſinuation or Probation of Teſtaments, Controverſies touching the ſame, and of Legacies of Goods and Monies, *&c.*

Altho' *de Jure Communi* the Cognizance of Wills and Teſtaments does not belong

to the Eccleſiaſtical Court, but to the Temporal or Civil Juriſdiction; yet *de Conſuetudine Angliæ pertinet ad Judices Eccleſiaſticos*, as *Linwood* himſelf agrees, *Exercit. de Teſtamentis, cap. 4. in Gloſſa.* So that it is the Cuſtom or Law of *England* that gives the Extent and Limits of their external Juriſdiction in *Foro Contentioſo.*

The Rule by which they proceed, is the Canon Law, but not in its full Latitude, and only ſo far as it ſtands uncorrected, either by contrary Acts of Parliament, or the Common Law and Cuſtom of *England*; for there are divers Canons made in ancient Times, and Decretals of the Popes that never were admitted here in *England*, and particularly in relation to Tythes; many Things being by our Laws Priviledg'd from Tythes, which by the Canon Law are chargable, (as Timber, Oar, Coals, *&c*) without a Special Cuſtom ſubjecting them thereunto. They Uſe the Canon Law,

Where the Canon Law, or the *Stylus Curiæ*, is ſilent, the Civil Law is taken in as a Director, eſpecially in Points of Expoſition and Determination, touching Wills and Legacies. And Civil.

But Things that are of Temporal Cognizance only, cannot by Charter be delivered over to Eccleſiaſtical Juriſdiction, nor be judged according to the Rules of the Canon or Civil Law, which is *aliud Examen*, and not competent to the Nature of Things of Common Law Cognizance: And therefore, *Mich. 8 H. 4. Rot. 72. coram Rege*, when the Not to judge of Temporal Matters.

Chancellor of *Oxford* proceeded according to the Rule of the Civil Law in a Case of Debt, the Judgment was reversed in *B. R.* wherein the Principal Error assigned was, because they proceeded *per Legem Civilem ubi quilibet ligeus Domini Regis Regni sui Angliæ in quibuscunque placitis & querelis infra hoc Regnum factis & emergentibus de Jure tractari debet per Communem Legem Angliæ*; and altho' King *H.* 8. 14 *Anno Regni sui*, granted to the University a liberal Charter to proceed according to the Use of the University, *viz.* By a Course much conform'd to the Civil Law; yet that Charter had not been sufficient to have warranted such Proceedings without the Help of an Act of Parliament: And therefore in 13 *Eliz.* an Act passed, whereby that Charter was in effect enacted; and 'tis thereby that at this Day they have a kind of Civil Law Proceedure, even in Matters that are of themselves of Common Law Cognizance, where either of the Parties to the Suit are priviledg'd.

Privi-ledge of the Uni-versity.

Sentence enforced.

The Coertion or Execution of the Sentence in Ecclesiastical Courts, is only by Excommunication of the Person contumacious, and upon Signification thereof into *Chancery*, a Writ *de Excommunicato capiendo* issues, whereby the Party is imprisoned till Obedience yielded to the Sentence. But besides this Coertion, the Sentences of the Ecclesiastical Courts touching some Matters do introduce a real Effect, without any other Execution; as a Divorce, a *Vinculo Matrimonii* for the Causes of Consanguinity,

Precontract, or Frigidity, do induce a legal Diſſolution of the Marriage; ſo a Sentence of Deprivation from an Eccleſiaſtical Benefice, does by Vertue of the very Sentence, without any other Coertion or Execution, introduce a full Determination of the Intereſt of the Perſon deprived.

And thus much concerning the Eccleſiaſtical Courts, and the Uſe of the Canon and Civil Law in them, as they are the Rule and Direction of Proceedings therein.

Secondly, The Second Special Juriſdiction wherein the Civil Law is allow'd, at leaſt as a Director or Rule in ſome Caſes, is the Admiral Court or Juriſdiction. This Juriſdiction is derived alſo from the Crown of *England*, either immediately by Commiſſion from the King, or mediately, which is ſeveral Ways, either by Commiſſion from the Lord High Admiral, whoſe Power and Conſtitution is by the King, or by the Charters granted to particular Corporations bordering upon the Sea, and by Commiſſion from them, or by Preſcription, which nevertheleſs in Preſumption of Law is derived at firſt from the Crown by Charter not now extant. *2dly.* The Admiral Juriſdiction.

The Admiral Juriſdiction is of Two Kinds, *viz. Juriſdictio Voluntaria*, which is no other but the Power of the Lord High Admiral, as the King's General at Sea over his Fleets; or *Juriſdictio Contentioſa*, which is that Power of Juriſdiction which the Judge of the Admiralty has in *Foro Contentioſo*; and what I have to ſay is of this later Juriſdiction. Of Two Kinds.

How Restrained.

The Jurisdiction of the Admiral Court, as to the Matter of it, is confined by the Laws of this Realm to Things done upon the High Sea only; as Depredations and Piracies upon the High Sea; Offences of Masters and Mariners upon the High Sea; Maritime Contracts made and to be executed upon the High Sea; Matters of Prize and Reprizal upon the High Sea. But touching Contracts or Things made within the Bodies of *English* Counties, or upon the Land beyond the Sea, tho' the Execution thereof be in some Measure upon the High Sea, as Charter Parties, or Contracts made even upon the High Sea, touching Things that are not in their own Nature Maritime, as a Bond or Contract for the Payment of Money; so also of Damages in Navigable Rivers, within the Bodies of Counties, Things done upon the Shore at Low-Water, Wreck of the Sea, *&c.* These Things belong not to the Admiral's Jurisdiction: And thus the Common Law, and the Statutes of 13 *Rich.* 2. *cap.* 15. 15 *Rich.* 2. *cap.* 3. confine and limit their Jurisdiction to Matters Maritime, and such only as are done upon the High Sea.

The Ground of its Authority.

This Court is not bottom'd or founded upon the Authority of the Civil Law, but has both its Power and Jurisdiction by the Law and Custom of the Realm, in such Matters as are proper for its Cognizance; and this appears by their Process, *viz.* The Arrest of the Persons of the Defendants as well as by Attachment of their Goods; and like-

likewise by those Customs and Laws Maritime, whereby many of their Proceedings are directed, and which are not in many Things conformable to the Rules of the Civil Law; such are those ancient Laws of *Oleron*, and other Customs introduced by the Practice of the Sea, and Stile of the Court.

Also, The Civil Law is allowed to be the Rule of their Proceedings, only so far as the same is not contradicted by the Statute of this Kingdom, or by those Maritime Laws and Customs, which in some Points have obtain'd in Derogation of the Civil Law: But by the Statute 28 *Hen.* 8. *cap.* 15. all Treasons, Murders, Felonies, done on the High Sea, or in any Haven, River, Creek, Port or Place, where the Admirals have, or pretend to have Jurisdiction, are to be determined by the King's Commission, as if the Offences were done at Land, according to the Course of the Common Law.

And thus much shall serve touching the Court of *Admiralty*, and the Use of the Civil Law therein.

Thirdly, The Third Court, wherein the Civil Law has its Use in this Kingdom, is the Military Court, held before the Constable and Marshal anciently, as the *Judiciis Ordinarii* in this Case, or otherwise before the King's Commissioners of that Jurisdiction, as *Judices Delegati*. 3. The Military Court.

Its Jurisdiction. The Matter of their Jurisdiction is declared and limited by the Statutes of 8 *R.* 2. *cap.* 5. & 13 *R.* 2. *cap.* 2. And not only by those Statutes, but more by the very Common Law is their Jurisdiction declared and limited as follows, *viz.*

Negatively. *First*, Negatively: They are not to medle with any Thing determinable by the Common Law: And therefore, in as much as Matter of Damages, and the Quantity and Determination thereof, is of that Conuzance; the Court of Constable and Marshal cannot, even in such Suits as are proper for their Conuzance, give Damages against the Party convicted before them, and at most can only order Reparation in Point of Honour, as *Mendacium sibi ipsi imponere*: Neither can they, as to the Point of Reparation, in Honour, hold Plea of any such Words or Things, wherein the Party is relievable by the Courts of the Common Law.

Affirmatively. *Secondly*, Affirmatively: Their Jurisdiction extends to Matters of Arms and Matters of War, *viz.*

First, As to Matters of Arms (or Heraldry), the Constable and Marshal had Conuzance thereof, *viz.* Touching the Rights of Coat-Armour, Bearings, Crests, Supporters, Pennons, *&c.* And also touching the Rights of Place and Precedence, in Cases where either Acts of Parliament or the King's Patent (he being the Fountain of

of Honour) have not already determined it, for in such Cases they have no Power to alter it. Those Things were anciently allowed to the Conuzance of the Constable and Marshal, as having some Relation to Military Affairs; but so restrain'd, that they were only to determine the Right, and give Reparation to the Party injured in Point of Honour, but not to repair him in Damages.

Office of Constable and Marshal.

But, *Secondly*, As to Matters of War. The Constable and Marshal had a double Power, *viz.*

1. A Ministerial Power, as they were Two great ordinary Officers, anciently, in the King's Army; the Constable being in Effect the King's General, and the Marshal was imployed in marshalling the King's Army, and keeping the List of the Officers and Soldiers therein; and his Certificate was the Trial of those whose Attendance was requisite, *Vide Littleton*, §. 102.

Again, 2. The Constable and Marshal had also a Judicial Power, or a Court wherein several Matters were determinable: As 1*st*, Appeals of Death or Murder committed beyond the Sea, according to the Course of the Civil Law. 2*dly*, The Rights of Prisoners taken in War. 3*dly*, The Offences and Miscarriages of Soldiers, contrary to the Laws and Rules of the Army: For always preparatory to an actual War, the Kings of this Realm, by Advice of the Constable (and Marshal), were used to compose a Book of *Rules* and *Orders* for

the due Order and Discipline of their Officers and Soldiers, together with certain Penalties on the Offenders; and this was called, *Martial Law* We have extant in the Black Book of the Admiralty, and elsewhere, several Exemplars of such Military Laws, and especially that of the 9th of *Rich.* 2. composed by the King, with the Advice of the Duke of *Lancaster*, and others.

Of Law Martial

But touching the Business of Martial Law, these Things are to be observed, *viz.*

First, That in Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance, *Quod enim Necessitas cogit defendit.*

Secondly, This indulged Law was only to extend to Members of the Army, or to those of the opposite Army, and never was so much indulged as intended to be (executed or) exercised upon others; for others who were not listed under the Army, had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army; whereof they were not Parts, but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.

Thirdly, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be per-

permitted in Time of Peace, when the Kings Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right, 3 *Car.* 1. whereby such Commissions and Martial Law were repealed and declared to be contrary to Law: And accordingly was that famous Case of *Edmond* Earl of *Kent*; who being taken at *Pomfret*, 15 *Ed.* 2. the King and divers Lords proceeded to give Sentence of Death against him, as in a kind of Military Court by a Summary Proceeding; which Judgment was afterwards in 1 *Ed.* 3. revers'd in Parliament: And the Reason of that Reversal serving to the Purpose in Hand, I shall here insert it as entered in the Record, *viz.*

Quod cum quicunq; homo ligeus Domini Regis pro Seditionibus, &c. tempore pacis captus & in quacunq; Curia Domini Regis ductus fuerit de ejusmodi Seditionibus & aliis Felonias sibi impositis per Legem & Consuetudine Regni arrectari debet & ad Responsionem adduci, Et inde per Communem Legem, antequam fuerit Morti adjudicand' (triari) &c. Unde cum notorium sit & manifestum quod totum tempus quo impositum fuit eidem Comiti propter Mala & Facinora fecisse, ait tempus in quo captus fuit & in quo Morti adjudicatus fuit, fuit tempus Pacis maximæ, Cum per totum tempus predictum & Cancellaria & aliæ plac. Curiæ Domini Regis apertæ fuer' in quibus cuilibet Lex fiebatur sicut fieri consuevit, Nec idem Dominus Rex unquam tempore illo cum vexillis explicatis

explicatis Equitabat, &c. And accordingly the Judgment was revers'd; for Martial Law, which is rather indulg'd than allowed, and that only in Cases of Necessity, in Time of open War, is not permitted in Time of Peace, when the ordinary Courts of Justice are open.

In this Military Court, Court of Honour, or Court Martial, the Civil Law has been used and allowed in such Things as belong to their Jurisdiction; as the Rule or Direction of their Proceedings and Decisions, so far forth as the same is not controuled by the Laws of this Kingdom, and those Customs and Usages which have obtain'd in *England*, which even in Matters of Honour are in some Points derogatory to the Civil Law. But this Court has been long disused upon great Reasons.

And thus I have given a brief Prospect of these Courts and Matters, wherein the Canon and Civil Law has been in some Measure allowed, as the Rule or Direction of Proceedings or Decisions: But although in these Courts and Matters the Laws of *England*, upon the Reasons and Account before expressed, have admitted the Use and Rule of the Canon and Civil Law; yet even herein also, the Common Law of *England* has retain'd those *Signa Superioritatis*, and the Preference and Superintendence in relation to those Courts: Namely,

Prehemi-nence of the Com-mon Law.

1. 1*st*. As the Laws and Statutes of the Realm have prescribed to those Courts their Bounds

Bounds and Limits, ſo the Courts of Common Law has the Superintendency over thoſe Courts to keep them within the Limits and Bounds of their ſeveral Juriſdictions, and to judge and determine whether they have exceeded thoſe Bounds, or not; and in caſe they do exceed their Bounds, the Courts at Common Law iſſue their Prohibitions to reſtrain them, directed either to the Judge or Party, or both: And alſo, in caſe they exceed their Juriſdiction, the Officer that executes the Sentence, and in ſome Caſes the Judge that gives it, are puniſhable in the Courts at Common Law; ſometimes at the Suit of the King, ſometimes at the Suit of the Party, and ſometimes at the Suit of both, according to the Variety and Circumſtances of the Caſe. 1

2*dly*. The Common Law, and the Judges of the Courts of Common Law, have the Expoſition of ſuch Statutes or Acts of Parliament as concern either the Extent of the Juriſdiction of thoſe Courts (whether Eccleſiaſtical, Maritime or Military) or the Matters depending before them; and therefore, if thoſe Courts either refuſe to allow theſe Acts of Parliament, or expound them in any other Senſe than is truly and properly the Expoſition of them, the King's Great Courts of the Common Law (who next under the King and his Parliament have the Expoſition of thoſe Laws) may prohibit and controul them. 2

And thus much touching thoſe Courts wherein the Civil and Canon Laws are allowed

lowed as Rules and Directions under the Restrictions above-mentioned: Touching which, the Sum of the Whole is this:

1. *First*, That the Jurisdiction exercised in those Courts is derived from the Crown of *England*, and that the last Devolution is to the King, by Way of Appeal.

2. *Secondly*, That although the Canon or Civil Law be respectively allowed as the Direction or Rule of their Proceedings, yet that is not as if either of those Laws had any original Obligation in *England*, either as they are the Laws of Emperors, Popes, or General Councils, but only by Vertue of their Admission here, which is evident; for that those Canons or Imperial Constitutions which have not been received here do not bind; and also, for that by several contrary Customs and Stiles used here, many of those Civil and Canon Laws are comptrouled and derogated.

3. *Thirdly*, That although those Laws are admitted in some Cases in those Courts, yet they are but *Leges sub graviori Lege*; and the Common Laws of this Kingdom have ever obtain'd and retain'd the Superintendency over them, and those *Signa Superioritatis* before-mentioned, for the Honour of the King and the Common Laws of *England*.

CHAP.

CHAP. III.

Concerning the Common Law of England, *its Use and Excellence, and the Reason of its Denomination.*

I Come now to that other Branch of our Laws, the common Municipal Law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of common Justice in this great Kingdom; of which it has been always tender, and there is great Reason for it; for it is not only a very just and excellent Law in it self, but it is singularly accommodated to the Frame of the *English* Government, and to the Disposition of the *English* Nation, and such as by a long Experience and Use is as it were incorporated into their very Temperament, and, in a manner, become the Complexion and Constitution of the *English* Commonwealth.

Insomuch, that even as in the natural Body the due Temperament and Constitution does by Degrees work out those accidental Diseases which sometimes happen, and do reduce the Body to its just State and Constitution; so when at any Time through the Errors, Distempers or Iniquities of Men or Times,

Times, the Peace of the Kingdom, and right Order of Government, have received Interruption, the Common Law has wasted and wrought out those Distempers, and reduced the Kingdom to its just State and Temperament, as our present (and former) Times can easily witness.

This Law is that which asserts, maintains, and, with all imaginable Care, provides for the Safety of the King's Royal Person, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom; and the Law is also, that which declares and asserts the Rights and Liberties, and the Properties of the Subject; and is the just, known, and common Rule of Justice and Right, between Man and Man, within this Kingdom.

And from hence it is, that the Wisdom of the Kings of *England*, and their great Council, the Honourable Houses of Parliament, have always been jealous and vigilant for the Reformation of what has been at any Time found defective in it, and so to remove all such Obstacles as might obstruct the free Course of it, and to support, countenance and encourage the Use of it, as the best, safest and truest Rule of Justice in all Matters, as well Criminal as Civil.

I should be too Voluminous to give those several Instances that occur frequently in the Statutes, the Parliament Rolls, and Par-

Parliamentary Petitions, touching this Matter; and ſhall therefore only inſtance in ſome few Particulars in both Kinds, *viz.* Criminal and Civil: And Firſt, in Matters Civil.

1. Civil Caſes.

In the Parliament 18 *Ed.* 1. In a Petition in the Lords Houſe, touching Land between *Hugh Lowther* and *Adam Edingthorp*: The Defendant alledges, That if the Title ſhould in this Manner be proceeded in, he ſhould loſe the Benefit of his Warranty; and alſo, that the Plaintiff, if he hath any Right, hath his Remedy at Common Law by Aſſize of *Mortdanceſtor*, and therefore demands Judgment, *Si de Libero Tenemento debeat hic ſine brevi Reſpondere*; and the Judgment of the Lords in Parliament thereupon is entered in theſe Words, *viz. Et quia actio de predicto Tenemento petendo & etiam ſuum recuperare, ſi quid habere debeat vel poſſit eidem Adæ per Aſſiſam mortis Anteceſſoris competere debet nec eſt juri conſonum vel hactenus in Curia iſta uſitat' quod aliquis ſine Lege Communi, & Brevi de Cancellaria de libero Tenemento ſuo reſpondeat & maxime in Caſu ubi Breve de Cancellaria Locum habere poteſt, dictum eſt præfato Adæ quod ſibi perquirat per Breve de Cancellaria, ſi ſibi viderit Expederire.*

Rot. Parl. 13 *R.* 2. N° 10. *Adam Chaucer* preferred his Petition to the King and Lords in Parliament, againſt Sir *Robert Knolles*, to be relieved touching a Mortgage, which he ſuppoſed was ſatisfied, and to have Reſtitution of his Lands. The Defendant appeared, and upon the ſeveral Allegations on both Sides,

Sides, the Judgment is thus entered, *viz. Et apres les Raiſons & les Allegeances de l'un party & de l'autre, y ſembles a Seigneurs du Parlement que le dit Petition ne eſtoit Petition du Parlement, deins que le mattier en icel comprize* douit eſtre diſcuſs *per le Commune Ley. Et pur ceo agard fuit que le dit* Robert *iroit eut ſans jour & que le dit* Adam *ne prendroit rien per ſa ſuit icy, eins que il ſueroit per le Commune Ley ſi il luy ſembloit ceo faire.* Where we may note, the Words are *Douit eſtre*, and not *Poet eſtre diſcuſſe per le, &c.*

Rot. Parl. 50 *Ed.* 3. N° 43. A Judgment being given againſt the Biſhop of *Norwich*, for the Archdeaconry of *Norwich*, in the Common Bench, the Biſhop petitioned the Lords in Parliament, that the Record might be brought into that Houſe, and to be reverſed for Error. *Et quoy a luy eſtoit finalement Reſpondu per common Aſſent des ils les Juſtices que ſi Error y fuſt ſi aſcun a fine force per le Ley de* Angleterre *tiel Error fuit voire en Parlement immediatement per voy de Error ains en Bank le Roy, & en nul part ailhors, Mais ſi le Caſe avenoit que Error fuſt fait en Bank le Roy adonque ceo ſerra amendes en Parlement.*

And let any Man but look over the Rolls of Parliament, and the Bundles of Petitions in Parliament, of the Times of *Ed.* I. *Ed.* II. *Ed.* III. *Hen.* IV. *H.* V. *&* *H.* VI. he will find Hundreds of Anſwers of Petitions in Parliament concerning Matters determinable at Common Law, endorſed with Anſwers to this, or the like Effect, *viz. Suez vous a le*

Commune Ley; sequatur ad Communem Legem; Perquirat Breve in Cancellaria si sibi viderit expedire; ne est Petition du Parlement; Mandetur ista Petitio in Cancellariam, vel Cancellario, vel Justiciariis de Banco, vel Thesaurario & Baronibus de Scaccario, and the like. Answers of Petitions in Parliament.

And these were not barely upon the *Bene placita* of the Lords, but were *De jure*, as appears by those former Judgments given in the Lords House in Parliament; and the Reason is evident: *First*, Because if such a Course of Extraordinary Proceeding should be had before the Lords in the first Instance, the Party should lose the Benefit of his Appeal by Writ of Error, according as the Law allows; and that is the Reason, why even in a Writ of Error, or Petition of Error upon a Judgment in any inferior Court, it cannot go *per Saltum* into Parliament, till it has passed the Court of *King's-Bench*; for that the First Appeal is thither. *Secondly*, Because the Subject would by that Means lose his Trial *per Pares*, and consequently his Attaint, in case of a Mistake in Point of Issue or Damages: To both which he is entitled by Law.

And although some Petitions of this Nature have been determined in that Manner, yet it has been (generally) when the Exception has not been started, or at least not insisted upon: And One Judgment in Parliament, that Cases of that Nature ought to be determined according to the Course of the Common Law, is of greater Weight than many Cases to the contrary, wherein the

Question was not ſtirred: Yea, even tho' it ſhould be ſtirred, and the contrary affirm'd upon a Debate of the Queſtion, becauſe greater Weight is to be laid upon the Judgment of any Court when it is excluſive of its Juriſdiction, than upon a Judgment of the ſame Court in Affirmance of it.

2. Criminal Caſes. Now as to Matters Criminal, whether Capital or not, they are determinable by the Common Law, and not otherwiſe; and in Affirmance of that Law, where the Statutes of *Magna Charta*, *cap.* 29. 5 *Ed.* 3. *cap.* 9. 25 *Ed.* 3. *cap.* 4. 29 *Ed.* 3. *cap.* 3. 27 *Ed.* 3. *cap.* 17. 38 *Ed.* 3. *cap.* 9. & 40 *Ed.* 3. *cap.* 3. The Effect of which is, That no Man ſhall be put out of his Lands or Tenements, or be impriſoned upon any Suggeſtion, unleſs it be by Indictment or Preſentment of lawful Men, or by Proceſs at Common Law.

And by the Statute of 1 *Hen.* 4. *cap.* 14. it is enacted, That no Appeals be ſued in Parliament at any Time to come: This extends to all Accuſations by particular Perſons, and that not only of Treaſon or Felony, but of other Crimes and Miſdemeanors. It is true, the Petition upon which that Act was drawn up, begins with Appeals of Felony and Treaſon, but the Cloſe thereof, as alſo the King's Anſwer, refers as well to Miſdemeanors as Matters Capital; and becauſe this Record will give a great Light to this whole Buſineſs, I will here ſet down the Petition and the Anſwer verbatim. *Vide Rot. Parl.* 1 *Hen.* 4. *N°* 144.

Item,

Item, *Supplyont les Commens que defore en avant nul appele de Traiſon ne de autre Felony quelconq; ſoit accept ou receive en le Parlement ains en vous autres Courts de dans voſtre Realm dementiers que en vous dits Courts purra eſtre Terminer come ad ote fait & uſe anciennement en temps de vous noble Progeniteurs; Et que cheſcun Perſon qui en temps a venir ſerra accuſe ou impeach en voſtre Parlement ou en aſcuns des vos dits Courts per les Seigniors & Commens di voſtre Realm ouper aſcun Perſon & defence ou Reſponſe a ſon Accuſement ou Empeachment & ſur ſon Reſponſe reaſonable Record Jugement & Tryal come de ancienement temps ad eſtre fait & uſe per les bones Leges de voſtre Realm, nient obſtant que les dits Empeachements ou Accuſements ſoient faits per les Seigneurs ou Commens de voſtre Relme come que de novel en temps de Ric. nadgarius Roy ad eſtre fait & uſe a contrar, a tres grand Miſchief & tres grand Maleveys Exemple de voſtre Realm.*

Petition. 1 *Hen.* 4. N° 144.

Le Roy voet que de cy en avant toutes les Appeles de choſes faits deins le Relme ſoient tryez & terminez per les bones Leys faits en temps de tres noble Progeniteurs de noſtre dit Seigneur le Roy, Et que touts les Appeles de choſes faits hors du Realm, ſoient triez & terminez devant le Conſtable & Marſhal de Angleterre, *& que nul Appele ſoit fait en Parlement defore en aſcun temps a venir.*

Anſwer.

This is the Petition and Anſwer. The Statute as drawn up hereupon, is *general*, and runs thus: Item, *Pur pluſieurs grands Inconveniencies & Miſcheifs que pluſieurs fait ont*

Stat. 1 *H.* 4. *cap.* 14.

advenus per colour des pluſieurs Appeles faits deins le Realm avant ces heurs ordain eſt & eſtablux, Que deſore en avant touts Appeles de choſes faits deins le Realm ſoient tries & termines per les bones Luys de le Realm faits & uſes en temps de tres noble Progeniteurs de dit noſtre Seigneur le Roy; Et que ils les Appeles de choſes faits hors du Realm ſoient tries & termines devant le Conſtable & Marſhal pur les temps eſteant; Et ouſter accordes eſt & aſſentus que nulls Appeles ſoient deſore faits ou purſues en Parlement en nul temps avenir.

Where we may obſerve, That though the Petition expreſſes (only) Treaſon and Felony, yet the Act is general againſt all Appeals in Parliament; and many Times the Purview of an Act is larger than the Preamble, or the Petition, and ſo 'tis here: For the Body of the Act prohibits all Appeals in Parliament, and there was Reaſon for it: For the Miſchief, *viz.* Appeals in Parliament in the Time of King *Richard* II. (as in the Petition is ſet forth) were not only of Treaſon and Felony, but of Miſdemeanors alſo, as appears by that great Proceeding, 11 *R.* 2. againſt divers, by the Lords Appellants; and conſequently it was neceſſary to have the Remedy as large as the Miſchief. And I do not remember that after this Statute there were any Appeals in Parliament, either for Matters Capital or Criminal, at the Suit of any Particular Perſon or Perſons.

It

It is true, Impeachments by the House of Commons, sent up to the House of Lords, were frequent as well after as before this Statute, and that justly, and with good Reason; for that neither the Act nor the Petition ever intended to restrain them, but only to regulate them, *viz.* That the Parties might be admitted to their Defence to them, and as neither the Words of the Act nor the Practice of After-times extended to restrain such Impeachments as were made by the House of Commons, so neither do those Impeachments and Appeals agree in their Nature or Reason; for Appeals were nothing else but Accusations, either of Capital or Criminal Misdemeanors, made in the Lords House by particular Persons; but an Impeachment is made by the Body of the House of Commons, which is equivalent to an Indictment *pro Corpore Regni*, and therefore is of another Nature than an Accusation or Appeal, only herein they agree, *viz.* Impeachments in Cases Capital against Peers of the Realm, have been ever tried and determined in the Lords House; but Impeachments against a Commoner have not been usual in the House of Lords, unless preparatory to a Bill, or to direct an Indictment in the Courts below: But Impeachments at the Prosecution of the House of Commons, for Misdemeanors as well against a Commoner as any other, have usually received their Determinations and final Judgments in the House of Lords; whereof there have been numerous Prece-

Impeachments, and Appeals.

dents in all Times, both before and since the said Act.

And thus much in general touching the great Regard that Parliaments and the Kingdom have had, and that most justly to the Common Law, and the great Care they have had to preserve and maintain it, as the Common Interest and Birthright of the King and Kingdom.

Appellation of the Common Law.

I shall now add some few Words touching the Stiles and Appellations of the Common Law, and the Reasons of it: 'Tis called sometimes by Way of Eminence, *Lex Terræ*, as in the Statute of *Magna Charta*, *cap.* 29. where certainly the Common Law is at least principally intended by those Words, *aut per Legem Terræ*, as appears by the Exposition thereof in several subsequent Statutes, and particularly in the Statute 28 *Ed.* 3. *cap.* 3. which is but an Exposition and Declaration of that Statute: Sometimes 'tis called, *Lex Angliæ*, as in the Statute of *Merton*, *cap.*.... *Nolumus Leges Angliæ mutare*, *&c.* Sometimes 'tis called, *Lex & Consuetudo Regni*, as in all Commissions of *Oyer* and *Terminer*, and in the Statutes of 18 *Ed.* 1. *cap.*.. and *De Quo Warranto*, and divers others; but most commonly 'tis call'd, *The Common Law*, or, *The Common Law of* England, as in the Statute of *Articuli super Chartas*, *cap.* 15. in the Statute 25 *Ed.* 3. *cap.* 5. and infinite more Records and Statutes.

Now the Reason why 'tis call'd, *The Common Law*, or what was the Occasion that first

first gave that Determination to it, is variously assigned, *viz.* The Reasons thereof.

First, Some have thought it to be so called by Way of Contradistinction to those other Laws that have obtain'd within this Kingdom; as, 1*st*. By Way of Contradistinction to the Statute Law, thus a Writ of Entry *ad Communem Legem*, is so call'd in Contradistinction to Writs of Entry in *Casu consimili*, and in *Casu proviso*, which are given by Act of Parliament. 2*dly*, By Way of Contradistinction to particular Customary Laws: Thus Discents at Common Law, Dower at Common Law, are in Contradistinction to such Dowers and Discents as are directed by particular Customs. And 3*dly*, In Contradistinction to the Civil, Canon, Martial and Military Laws, which are in some particular Cases and Courts admitted, as the Rule of their Proceedings.

Secondly, Some have conceived, that the Reason of this Appellation was this, *viz.* In the beginning of the Reign of *Edward* III. before the Conquest, commonly called, *Edward the Confessor*, there were several Laws, and of several Natures, which obtain'd in several Parts of this Kingdom, *viz.* The *Mercian Laws*, in the Counties of *Glocester*, *Worcester*, *Hereford*, *Warwick*, *Oxon*, *Chester*, *Salop* and *Stafford*. The *Danish* Laws, in the Counties of *York*, *Derby*, *Nottingham*, *Leicester*, *Lincoln*, *Northampton*, *Bedford*, *Bucks*, *Hartford*, *Essex*, *Middlesex*, *Norfolk*, *Suffolk*, *Cambridge* and *Huntington*. The *West-Saxon* Laws, in the Counties of *Kent*, *Sussex*, *Surrey*, *Berks*,

Southampton, Wilts, Somerset, Dorset, and *Devon.*

This King, to reduce the Kingdom as well under one Law, as it then was under one Monarchical Government, extracted out of all those Provincial Laws, one Law to be observed through the whole Kingdom: Thus *Ranulphus Cestrensis,* cited by Sir *Henry Spelman* in his *Glossary,* under the Title, *Lex,* says, *Ex tribus his Legibus Sanctus Edvardus unam Legem ..... &c.* And the same in *totidem verbis,* is affirm'd in his History of the last Year of the same King *Edward. (Vide ibid. plura de hoc.)* But *Hoveden* carries up the *Common Laws,* or those stiled the *Confessor's Laws,* much further; for he in his History of *Henry* II. tells us, *Quod istæ Leges priùs inventæ & constitutæ erant Tempore* Edgari, *Avi sui, &c. (Vide Hoveden.)* And possibly the Grandfather might be the first Collector of them into a Body, and afterwards *Edward* might add to the Composition, and give it the Denomination of the Common Law; but the Original of it cannot in Truth be referred to either, but is much more ancient, and is as undiscoverable as the Head of *Nile:* Of which more at large in the following Chapter.

The Confessor's Laws.

Thirdly, Others say, and that most truly, That it is called the Common Law, because it is the common Municipal Law or Rule of Justice in this Kingdom: So that *Lex Communis,* or *Jus Commune,* is all one and the same with *Lex Patriæ,* or *Jus Patrium*; for although there are divers particular Laws, some

some by Custom applied to particular Places, and some to particular Causes; yet that Law which is common to the generality of all Persons, Things and Causes, and has a Superintendency over those particular Laws that are admitted in relation to particular Places or Matters, is *Lex Communis Angliæ*, as the Municipal Laws of other Countries may be, and are sometimes call'd, *The Common Law of that Country*; as, *Lex Communis Norrica*, *Lex Communis Burgundica*, *Lex Communis Lombardica*, *&c.* So that although all the former Reasons have their Share in this Appellation, yet the principal Cause thereof seems to be the later: And hence some of Ancients call'd it *Lex Communis*, others *Lex Patriæ*; and so they were called in their Confirmation by King *William* I. Whereof hereafter.

CHAP.

CHAP. IV.

Touching the Original of the Common Law of England.

THE Kingdom of *England* being a very ancient Kingdom, has had many Viciſſitudes and Changes (eſpecially before the coming in of King *William* I.) under ſeveral either Conqueſts or Acceſſions of Foreign Nations. For tho' the *Britains* were, as is ſuppoſed, the moſt ancient Inhabitants, yet there were mingled with them, or brought in upon them, the *Romans*, the *Picts*, the *Saxons*, the *Danes*, and laſtly, the *Normans*; and many of thoſe Foreigners were as it were incorporated together, and made one Common People and Nation; and hence ariſes the Difficulty, and indeed Moral Impoſſibility, of giving any ſatisfactory or ſo much as probable Conjecture, touching the Original of our Laws, for the following Reaſons, *viz.*

The Difficulty of diſcovering their Original

Firſt, From the Nature of Laws themſelves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as thoſe Exigencies and Conveniencies do inſenſibly grow upon the People, ſo many times there grows inſenſibly a Variation of Laws, eſpecially in a long tract of Time; and hence it is, that tho' for the Purpoſe in ſome particular Part of

of the Common Law of *England*, we may eaſily ſay, That the Common Law, as it is now taken, is otherwiſe than it was in that particular Part or Point in the Time of *Hen.* II. when *Glanville* wrote, or than it was in the Time of *Hen.* III. when *Bracton* wrote, yet it is not poſſible to aſſign the certain Time when the Change began; nor have we all the Monuments or Memorials, either of Acts of Parliament, or of Judicial Reſolutions, which might induce or occaſion ſuch Alterations; for we have no authentick Records of any Acts of Parliament before 9 *H.* 3. and thoſe we have of that King's Time, are but few. Nor have we any Reports of Judicial Deciſions in any conſtant Series of Time before the Reign of *Edw.* I. tho' we have the Plea Rolls of the Times of *Hen.* III. and King *John*, in ſome remarkable Order. So that Uſe and Cuſtom, and Judicial Deciſions and Reſolutions, and Acts of Parliament, tho' not now extant, might introduce ſome *New* Laws, and alter ſome *Old*, which we now take to be the very Common Law it ſelf, tho' the Times and preciſe Periods of ſuch Alterations are not explicitely or clearly known: But tho' thoſe particular Variations and Acceſſions have happened in the Laws, yet they being only partial and ſucceſſive, we may with juſt Reaſon ſay, They are the ſame *Engliſh* Laws now, that they were 600 Years ſince in the general. As the *Argonauts* Ship was the ſame when it returned home, as it was when it went out, tho' in that long Voyage it had ſuc-

ſucceſſive Amendments, and ſcarce came back with any of its former Materials; and as *Titius* is the ſame Man he was 40 Years ſince, tho' Phyſitians tell us, that in a Tract of 7 Years, the Body has ſcarce any of the ſame Material Subſtance it had before.

Secondly, The 2d Difficulty in the Search of the Antiquity of Laws and their Original, is in relation to that People unto whom the Laws are applied, which in the Caſe of *England*, will render many Obſervables, to to ſhew it hard to be traced. For,

1ſt. It is an ancient Kingdom, and in ſuch Caſes, tho' the People and Government had continued the ſame *ab Origine*, (as they ſay the *Chineſes* did, till the late Incurſion of the *Tartars*) without the Mixture of other People, or Laws; yet it were an impoſſible Thing to give any certain Account of the Original of the Laws of ſuch a People, unleſs we had as certain Monuments thereof as the *Jews* had of theirs, by the Hand of *Moſes*, and that upon the following Accounts, *viz.*

Firſt, We have not any clear and certain Monuments of the Original Foundation of the *Engliſh* Kingdom or State, when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional; and ſince we cannot know the Original of the planting of this Kingdom, we cannot certainly know the Original of the Laws thereof, which may be well preſum'd to be very near as ancient as the Kingdom it ſelf. Again, *2dly*, Tho' Tra-

Tradition might be a competent Diſcoverer of the Original of a Kingdom or State, I mean Oral Tradition, yet ſuch a Tradition were incompetent without written Monuments to derive to us, at ſo long a Diſtance, the Original Laws and Conſtitutions of the Kingdom, becauſe they are of a complex Nature, and therefore not orally traducible to ſo great a Diſtance of Ages, unleſs we had the Original or Authentick Tranſcript of thoſe Laws, as the People the *Jews* had of their Law, or as the *Romans* had of their Laws of the Twelve Tables engraven in Braſs. But yet further, *3dly*, It is very evident to every Day's Experience, that Laws, the further they go from their original Inſtitution, grow the larger, and the more numerous: In the firſt Coalition of a People, their Proſpect is not great, they provide Laws for their preſent Exigence and Convenience: But in Proceſs of Time, poſſibly their firſt Laws are changed, altered or antiquated, as ſome of the Laws of the Twelve Tables among the *Romans* were: But whatſoever be done touching their *Old* Laws, there muſt of Neceſſity be a Proviſion of *New*, and other Laws ſucceſſively, anſwering to the Multitude of ſucceſſive Exigencies and Emergencies, that in long Tract of Time will offer themſelves; ſo that if a Man could at this Day have the Proſpects of all the Laws of the *Britains* before any Invaſion upon them, it would yet be impoſſible to ſay, which of them were *New*, and which were *Old*, and the ſeveral Seaſons and Periods

riods of Time wherein every Law took its Rise and Original, especially since it appears, that in those elder Times, the *Britains* were not reduc'd to that civiliz'd Estate, as to keep the Annals and Memorials of their Laws and Government, as the *Romans* and other civiliz'd Parts of the World have done.

It is true, when the Conquest of a Country appears, we can tell when the Laws of conquering People came to be given to the Conquered. Thus we can tell, that in the Time of *Hen.* II. when the Conquest of *Ireland* had obtain'd a good Progress, and in the Time of K. *John*, when it was compleated, the *English* Laws were settled in *Ireland*: But if we were upon this Inquiry, what were the Original of those *English* Laws that were thus settled there; we are still under the same Quest and Difficulty that we are now, *viz.* What is the Original of the *English* Laws. For they that begin *New* Colonies, Plantations and Conquests; if they settle *New* Laws, and which the Places had not before, yet for the most part (I don't say altogether) they are the *Old* Laws which obtain'd in those Countries from whence the Conquerors or Planters came.

Secondly, The 2*d* Difficulty of the Discovery of the Original of the *English* Laws is this, That this Kingdom has had many and great Vicissitudes of People that inhabited it, and that in their several Times prevail'd and obtain'd a great Hand in the Government of this Kingdom, whereby it came to

paſs, that there aroſe a great Mixture and Variety of Laws: In ſome Places the Laws of the *Saxons*, in ſome Places the Laws of the *Danes*, in ſome Places the Laws of the ancient *Britons*, in ſome Places the Laws of the *Mercians*, and in ſome Places, or among ſome People (perhaps) the Laws of the *Normans*: For altho', as I ſhall ſhew hereafter, the *Normans* never obtain'd this Kingdom by ſuch a Right of Conqueſt, as did or might alter the Eſtabliſhed Laws of the Kingdom, yet conſidering that K. *William* I. brought with him a great Multitude of that Nation, and many Perſons of great Power and Eminence, which were planted generally over this Kingdom, eſpecially in the Poſſeſſions of ſuch as had oppos'd his coming in, it muſt needs be ſuppos'd, that thoſe Occurrences might eaſily have a great Influence upon the Laws of this Kingdom, and ſecretly and inſenſibly introduce *New* Laws, Cuſtoms and Uſages; ſo that altho' the Body and Groſs of the Law might continue the ſame, and ſo continue the ancient Denomination that it firſt had, yet it muſt needs receive divers Acceſſions from the Laws of thoſe People that were thus intermingled with the ancient *Britains* or *Saxons*, as the Rivers of *Severn*, *Thames*, *Trent*, *&c.* tho' they continue the ſame Denomination which their firſt Stream had, yet have the Acceſſion of divers other Streams added to them in the Tracts of their Paſſage which enlarge and augment them. And hence grew thoſe ſeveral Denominations of the *Saxon*, *Mercian*, and *Daniſh* Laws, out

out of which (as before is shewn) the Confessor extracted his Body of the Common Law, and therefore among all those various Ingredients and Mixtures of Laws, it is almost an impossible Piece of Chymistry to reduce every *Caput Legis* to its true Original, as to say, This is a piece of the *Danish*, this of the *Norman*, or this of the *Saxon* or *British* Law: Neither was it, or indeed is it much Material, which of these is their Original; for 'tis very plain, the Strength and Obligation, and the formal Nature of a Law, is not upon Account that the *Danes*, or the *Saxons*, or the *Normans*, brought it in with them, but they became Laws, and binding in this Kingom, by Vertue only of their being received and approved here.

Thirdly, A Third Difficulty arises from those accidental Emergencies that happened, either in the Alteration of Laws, or communicating or conveying of them to this Kingdom: For first, the Subdivision of the Kingdom into small Kingdoms under the Heptarchy, did most necessarily introduce a Variation of Laws, because the several Parts of the Kingdom were not under one common Standard, and so it will soon be in any Kingdoms that are cantonized, and not under one common Method of Dispensation of Laws, tho' under one and the same King. *Again*, The Intercourse and Traffick with other Nations, as it grew more or greater, did gradually make a Communication and Transmigration of Laws from us to them, and from them to us.

Again, The growth of Chriſtianity in this Kingdom, and the Reception of Learned Men from other Parts, eſpecially from *Rome*, and the Credit that they obtained here, might reaſonably introduce ſome *New* Laws, and antiquate or abrogate ſome *Old* ones that ſeem'd leſs conſiſtent with the Chriſtian Doctrines, and by this Means, not only ſome of the Judicial Laws of the *Jews*, but alſo ſome Points relating to, or bordering upon, or derived from the Canon or Civil Laws, as may be ſeen in thoſe Laws of the ancient Kings, *Ina*, *Alphred*, *Canutus*, *&c.* collected by Mr. *Lambard*.

Having thus far premiſed, it ſeems, upon the whole Matter, an endleſs and inſuperable Buſineſs to carry up the *Engliſh* Laws to their ſeveral Springs and Heads, and to find out their firſt Original; neither would it be of any Moment or Uſe if it were done: For whenever the Laws of *England*, or the ſeveral *Capita* thereof began, or from whence or whomſoever derived, or what Laws of other Countries contributed to the Matter of our Laws; yet moſt certainly their Obligation ariſes not from their Matter, but from their Admiſſion and Reception, and Authorization in this Kingdom; and thoſe Laws, if convenient and uſeful for the Kingdom, were never the worſe, tho' they were deſumed and taken from the Laws of other Countries, ſo as they had their Stamp of Obligation and Authority from the Reception and Approbation of this Kingdom by Vertue of the Common Law, of which

this Kingdom has been always jealous, especially in relation to the Canon, Civil, and *Norman* Law, for the Reasons hereafter shewn.

Three Constituents of the Common Law.

Passing therefore from this unsearchable Inquiry, I shall descend to that which gives the Authority, *viz.* The formal Constituents, as I may call them, of the Common Law, and they seem to be principally, if not only, those three, *viz.* 1*st*, The Common Usage, or Custom, and Practice of this Kingdom, in such Parts thereof as lie in Usage or Custom. 2*dly*, The Authority of Parliament, introducing such Laws; and, 3*dly*, The Judicial Decisions of Courts of Justice, consonant to one another in the Series and Successions of Time.

1. Customs.

1. As to the first of these, Usage and Custom generally received, do *Obtinere vim Legis*, and is that which gives Power sometimes to the Canon Law, as in the Ecclesiastical Courts; sometimes to the Civil Law, as in the Admiralty Courts; and again, controules both, when they cross other Customs that are generally received in the Kingdom. This is that which directs Discents, has settled some ancient Ceremonies and Solemnities in Conveyances, Wills and Deeds, and in many more Particulars. And if it be inquired, What is the Evidence of this Custom, or wherein it consists, or is to be found? I answer, It is not simply an unwritten Custom, nor barely *Orally* derived down from one Age to another; but it is a Custom that is derived down

down in Writing, and transmitted from Age to Age, especially since the beginning of *Edw.* I. to whose Wisdom the Laws of *England* owe almost as much as the Laws of *Rome* to *Justinian*.

2. Acts of Parliament. And here it must not be wonder'd at, that I make Acts of Parliament one of the Authoritative Constituents of the Common Law, tho' I had before contradistinguished the one from the other; for we are to know, that altho' the Original or Authentick Transcripts of Acts of Parliament are not before the Time of *Hen.* III. and many that were in his Time are perish'd and lost; yet certainly such there were, and many of those Things that we now take for Common Law, were undoubtedly Acts of Parliament, tho' now not to be found of Record. And if in the next Age, the Statutes made in the Time of *Hen.* III. and *Edw.* I. were lost, yet even those would pass for Parts of the Common Law, and indeed, by long Usage, and the many Resolutions grounded upon them, and by their great Antiquity, they seem even already to be incorporated with the very Common Law; and that this is so, may appear, tho' not by Records, for we have none so ancient, yet by an authentical and unquestionable History, wherein a Man may, without much Difficulty, find, That many of those *Capitula Legum* that are now used and taken for Common Law, were Things enacted in Parliaments or Great Councils under *William* I. and his Predecessors, Kings

2*ly.* Statutes.

of *England*, as may be made appear hereafter. But yet, those Constitutions and Laws being made before Time of Memory, do now obtain, and are taken as part of the Common Law, and Immemorial Customs of the Kingdom: And so they ought now to be esteem'd, tho' in their first Original they were Acts of Parliament.

3dly. Judicial Decisions.

3. Judicial Decisions. It is true, the Decisions of Courts of Justice, tho' by Vertue of the Law of this Realm they do bind, as a Law between the Parties thereto, as to the particular Case in Question, till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in in Expounding, Declaring, and Publishing what the Law of this Kindom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of any private Persons, as such, whatsoever.

1*st*, Because the Persons who pronounce those Decisions, are Men chosen by the King for that Employment, as being of greater Learning, Knowledge, and Experience in the Laws than others. 2*dly*, Because they are upon their Oaths to judge according to the Laws of the Kingdom. 3*dly*, Because they have the best Helps to inform their Judgments. 4*thly*, Because they

they do *Sedere pro Tribunali*, and their Judgments are ſtrengthen'd and upheld by the Laws of this Kingdom, till they are by the ſame Law revers'd or avoided.

Now Judicial Deciſions, as far as they refer to the Laws of this Kindom, are for the Matter of them of Three Kinds: Of Three Kinds.

Firſt, They are either ſuch as have their Reaſons ſingly in the Laws and Cuſtoms of this Kingdom, as, Who ſhall ſucceed as Heir to the Anceſtor, what is the Ceremony requiſite for paſſing a Freehold, what Eſtate, and how much ſhall the Wife have for her Dower? And many ſuch Matters, wherein the ancient and expreſs Laws of the Kindom give an expreſs Deciſion, and the Judge ſeems only the Inſtrument to pronounce it: And in theſe Things, the Law or Cuſtom of the Realm is the only Rule and Meaſure to judge by, and in reference to thoſe Matters, the Deciſions of Courts are the Conſervatories and Evidences of thoſe Laws.

Secondly, Or they are ſuch Deciſions, as by way of Deduction and Illation upon thoſe Laws are framed or deduced; as for the Purpoſe, Whether of an Eſtate thus or thus limited, the Wife ſhall be endowed? Whether if thus or thus limited, the Heir may be barr'd? And infinite more of the like complicated Queſtions. And herein the Rule of Deciſion is, Firſt, the Common Law and Cuſtom of the Realm, which is

the great *Substratum* that is to be maintain'd; and then Authorities or Decisions of former Times in the same or the like Cases, and then the Reason of the Thing it self.

Thirdly, Or they are such as seem to have no other Guide but the common Reason of the Thing, unless the same Point has been formerly decided, as in the Exposition of the Intention of Clauses in Deeds, Wills, Covenants, *&c.* where the very Sense of the Words, and their Positions and Relations, give a rational Account of the Meaning of the Parties, and in such Cases the Judge does much better herein, than what a bare grave Grammarian or Logician, or other prudent Man could do; for in many Cases there have been former Resolutions, either in Point, or agreeing in Reason or Analogy with the Case in Question; or perhaps also, the Clause to be expounded is mingled with some Terms or Clauses that require the Knowledge of the Law to help out with the Construction or Exposition: Both which do often happen in the same Case, and therefore it requires the Knowledge of the Law to render and expound such Clauses and Sentences; and doubtless a good Common Lawyer is the best Expositor of such Clauses, *&c.* *Vide Plowden*, 122, to 130, 140, *&c.*

CHAP.

CHAP. V.

How the Common Law of England *ſtood at and for ſome Time after the coming in of King* William I.

IT is the Honour and Safety, and therefore the juſt Deſire of Kingdoms that recognize no Superior but God, that their Laws have thoſe two Qualifications, *viz.* 1*ſt*. That they be not dependent upon any Foreign Power; for a Dependency in Laws derogates from the Honour and Integrity of the Kingdom, and from the Power and Sovereignty of the Prince thereof. *Secondly*, That they taſte not of Bondage or Servitude; for that derogates from the Dignity of the Kingdom, and from the Liberties of the People thereof. Two Qualifications of the Laws of *England*.

In relation to the former Conſideration, the Kings of this Realm, and their great Councils, have always been jealous and careful, that they admitted not any Foreign Power, (eſpecially ſuch as pretended Authority to impoſe Laws upon other free Kingdoms or States) nor to countenance the Admiſſion of ſuch Laws here as were derived from ſuch a Power.

Rome, as well Ancient as Modern, pretended a kind of Univerſal Power and Intereſt; the former by their Victories,

which were large, and extended even to *Britain* it ſelf; and the later upon the Pretence of being Univerſal Biſhop or Vicar-General in all Matters Eccleſiaſtical; ſo that upon Pretence of the former, the Civil Law, and upon Pretence of the later, the Canon Law was introduc'd, or pretended to ſome kind of Right in the Territories of ſome abſolute Princes, and among others here in *England*: But this Kingdom has been always very jealous of giving too much Countenance to either of thoſe Laws, and has always ſhewn a juſt Indignation and Reſentment againſt any Encroachments of this Kind, either by the one Law or the other. It it true, as before is ſhewn, that in the Admiralty and Military Courts, the Civil Law has been admitted, and in the Eccleſiaſtical Courts, the Canon Law has been in ſome Particulars admitted. But ſtill they carry ſuch Marks and Evidences about them, whereby it may be known that they bind not, nor have the Authority of Laws from themſelves, but from the authoritative Admiſſion of this Kingdom.

Neither Canon nor Civil Law the Rule of Juſtice here.

And, as thus the Kingdom, for the Reaſons before given, never admitted the Civil or the Canon Law to be the Rule of the Adminiſtration of Common Juſtice in this Kingdom; ſo neither has it endured any Laws to be impoſed upon the People by any Right of Conqueſt, as being unſuitable to the Honour or Liberty of the *Engliſh* Kingdom, to recognize their Laws as given them at the Will and Pleaſure of a Conqueror.

queror. And hence it was, that altho' the People unjustly assisted King *Hen.* IV. in his Usurpation of the Crown, yet he was not admitted thereunto, until he had Declared, that he claimed not as a Conqueror, but as a Successor, only he reserved to himself the Liberty of extending a Pretence of Conquest against the *Scroops* that were Slain in Battle against him; which yet he durst not rest upon without a Confirmation in Parliament. *Vide Rot. Parl.* 1 *H.* 4. N° 56. *& Pars* 2. *Ib.* N° 17.

Our Laws not Impos'd by Conquest.

And upon the like Reason it was, That King *William* I. tho' he be called the Conqueror, and his attaining the Crown here, is often in History, and in some Records, called, *Conquestus Angliæ*; yet in Truth it was not such a Conquest as did, or could, alter the Laws of this Kingdom, or impose Laws upon the People, *per Modum Conquestus*, or *Jure Belli*: And therefore, to wipe off that false Imputation upon our Laws, as if they were the Fruit or Effect of a Conquest, or carried in them the Badge of Servitude to the Will of the Conqueror, which Notion some ignorant and prejudiced Persons have entertain'd; I shall rip up, and lay open this whole Business from the Bottom, and to that End enquire into the following Particulars, *viz.*

1. Of the Thing called Conquest, what it is, when attained, and the Rights thereof.

2. Of

2. Of the ſeveral Kinds of Conqueſt, and their Effects, as to the Alteration of Laws by the Victor.

3. How the *Engliſh* Laws ſtood at the Entry of King *William* the Firſt.

4. By what Title he entred, and whether by ſuch a Right of Conqueſt as did, or could, alter the *Engliſh* Laws.

5. Whether *De Facto* there was any Alteration of the ſaid Laws, and by what Means after his coming in.

Conqueſt, what it is.

Firſt, Touching the firſt of theſe, *viz.* Conqueſt, what it is, when attain'd, and the Rights thereof. It is true, That it ſeems to be admitted as a kind of Law among all Nations, That in caſe of a Solemn War between Supream Princes, the Conqueror acquires a Right of Dominion, as well as a Property over the Things and Perſons that are fully conquered; and the Reaſons aſſigned are Principally theſe, *viz.*

1*ſt*. Becauſe both Parties have appealed to the higheſt Tribunal that can be, *viz.* The Trial by War, wherein the great Judge and Sovereign of the World, *The Lord of Hoſts*, ſeems in a more eſpecial manner than in other Caſes to decide the Controverſy. 2*dly*, Becauſe unleſs this ſhould be a final Deciſion, Mankind would be deſtroy'd by endleſs Broils, Wars and Contentions; therefore, for the Preſervation of Mankind, this great Deciſion ought to be final, and the Conquer'd ought to acquieſce in it. 3*dly*, Becauſe if this ſhould not be admitted, and be

be by, as it were, the tacite Consent of Mankind accounted a lawful Acquisition, there would not be any Security or Peace under any Government: For by the various Revolutions of Dominion acquired by this Means, have been, and are to this Day the Successions of Kingdoms and States preserved. What was once the *Romans*, was before that the *Græcians*, and before them the *Persians*, and before the *Persians* the *Assyrians*; and if this just Victory were not allowed to be a firm Acquest of Dominion, the present Possessors would be still obnoxious to the Claim of the former Proprietors, and so they would be in a restless State of Doubts, Difficulties and Changes upon the Pretension of former Claims: Therefore, to cut off this Instability and Unsettledness in Dominion and Property, it would seem that the common Consent of all Nations has tacitely submitted, that Acquisition by Right of Conquest, in a Solemn War between Persons not Subjects of each other by Bonds of Allegiance or Fidelity, should be allowed as one of the lawful Titles of acquiring Dominion over the Persons, Places and Things so conquer'd.

But whatever be the real Truth or Justice of this Position, yet we are much at a Loss, touching the Thing in *Hypothesi*, *viz.* Whether this be the Effect of every Kind of Conquest? Whether the War be Just or Unjust? What are the Requisites to the Constituting of a just War? Who are the Persons that may acquire? And what are the

the Solemnities requiſite for that Acqueſt? But above all, the greateſt Difficulty is, when there ſhall be ſaid, Such a Victory as acquires this Right? Indeed, if there be a total Deletion of every Perſon of the Oppoſing Party or Country, then the Victory is compleat, becauſe none remains to call it in queſtion. But ſuppoſe they are beaten in one Battle, may they not rally again? Or if the greater Part be ſubdued, may not the leſſer keep their Ground? Or if they do not at the preſent, may they not in the next Age regain their Liberty? Or if they be quiet for a Time, may they not, as they have Opportunity, renew their Pretenſions? And altho' the Victor, by his Power, be able to quell and ſuppreſs them, yet he is beholding to his Sword for it, and the Right that he got by his Victory before, would not be ſufficient without a Power and Force to eſtabliſh and ſecure him againſt new Troubles. And on the other Side, if thoſe few ſubdu'd Perſons can by Force regain what they once had a Pretence to, a former Victory will be but a weak Defence; and if it would, they would have the like Pretence to a Claim of Acqueſt by Victory over him, as he had over them.

It ſeem therefore a difficult Thing to determine in what indiviſible Moment this Victory is ſo compleat, that *Jure Belli* the Acqueſt of Dominion is fully gotten, and therefore Victors uſe to ſecure themſelves againſt Diſputes of that Kind, and as it were to under-pin their Acqueſt *Jure Belli*, that

that they might not be loſt by the ſame Means, whereby they were gained by the Continuation of External Forces of Standing-Armies, Caſtles, Gariſons, Munitions, and other Acts of Power and Force, ſo as thereby to over-bear and prevent an ordinary Poſſibility of the Prevailing of the conquered or ſubdued People, againſt the Conqueror or Victor. He that lays the Weight of his Title upon Victory or Conqueſt, rarely reſts in it as a compleat Conqueſt, till he has added to it ſomewhat of Conſent or Faith of the Conquered, ſubmitting voluntarily to him, and then, and not till then, he thinks his Title ſecure, and his Conqueſt compleat: And indeed, he has no Reaſon to think his Title can be otherwiſe ſecure; for where the Title is meerly Force or Power, his Title will fail, if the Conquered can with like Force or Power overmatch his, and ſo regain their former Intereſt or Dominion.

Conſent.

Now this Conſent is of Two Kinds, either Expreſs'd, or Imply'd. An Expreſs Conſent is, when after a Victory the Party conquered do expreſly ſubmit themſelves to the Victors, either ſimply or abſolutely, by Dedition, yielding themſelves, giving him their Faith and their Allegiance; or elſe under certain Pacts, Conventions, Agreements, or Capitulations, as when the ſubdued Party, either by themſelves, or by Subſtitutes, or Delegates by them choſen, do yield their Faith and their Allegiance to the Victor upon certain Pacts or Agreements

1. Expreſſed.

ments between them; as for holding or continuing their Religion, their Laws, their Form of Civil Administration, &c.

And thus, tho' Force were perhaps the Occasion of this Consent, yet in truth 'tis Consent only that is the true proximate and fix'd Foundation of the Victor's Right; which now no longer rests barely upon external Force, but upon the express Consent and Pact of the subdu'd People, and consequently this Pact or Convention is that which is to be the immediate Foundation of that Dominion; and upon a diligent Observation of most Acquests gotten by Conquest, or so called, we shall find this to be the Conclusion of almost all Victories, they end in Deditions and Capitulations, and Faith given to the Conqueror, whereby oftentimes the former Laws, Privileges, and Possessions are confirmed to the Subdued, without which the Victors seldom continue long or quiet in their New Acquests, without extream Expence, Force, Severity and Hazard.

2. Implied. An implied Consent is, when the Subdued do continue for a long Time quiet and peaceable under the Government of the Victor, accepting his Government, submitting to his Laws, taking upon them the Offices and Employments under him, and obeying and owning him as their Governor, without opposing him, or claiming their former Right. This seems to be a tacite Acceptance of, and Assent to him; and tho' this is gradual, and possibly no

determinate Time is ſtinted, wherein a Man can ſay, this Year, or this Month, or this Day, ſuch a tacite Conſent was compleated and concluded; for Circumſtances may make great Variations in the Sufficiency of the Evidence of ſuch an Aſſent; yet by a long and quiet Tract of peaceable Submiſſion to the Laws and Government of the Victor, Men may reaſonably conjecture, that the Conquered have relinquiſhed their Purpoſe of regaining by Force what by Force they loſt.

But ſtill all this is intended of a lawful Conqueſt by a Foreign Prince or State, and not an Uſurpation by a Subject, either upon his Prince or Fellow Subject; for ſeveral Ages and Deſcents do not purge the Unlawfulneſs of ſuch an Uſurpation.

2. The Kinds and Effects of Conqueſt.

Secondly, Concerning the ſeveral Kinds of Conqueſts, and their Effects, as to the Alteration of Laws by the Victor. There ſeems to be a double kind of Conqueſt, which induces a various Conſideration touching the Change of Laws, *viz. Victoria in Regem & Populum, & Victoria in Regem tantum.* The Conqueſt over the People or Country, is when the War is denounced by a Prince or State Foreign, and no Subject, and when the Intention and Denunciation of the War is againſt the King and People or Country, and the Pretenſion of Title is by the Sword, or *Jure Belli*; ſuch were moſt of the Conqueſts of ancient Monarchs, *viz.* The *Aſſyrian, Perſian, Græcian,* and *Roman* Conqueſts; and in ſuch Caſes, the Acquiſitions of the Victor

Victor were absolute and universal, he gain'd the Interest and Property of the very Soil of the Country subdued; which the Victor might, at his Pleasure, give, sell or arrent: He gain'd a Power of abolishing or changing their Laws and Customs, and of giving New, or of imposing the Law of the Victor's Country. But although this the Conqueror might do, yet a Change of the Laws of the conquered Country was rarely universally made, especially by the *Romans*: Who, though in their own particular Colonies, planted in conquered Countries, they observed the *Roman* Law, which possibly might by Degrees, without any rigorous Imposition, gain and insinuate themselves into the conquered People, and so gradually obtain, and insensibly conform them, at least so many of them as were conterminous to the Colonies and Garisons to the *Roman* Laws; yet they rarely made a rigorous and universal Change of the Laws of the conquered Country, unless they were such as were foreign and barbarous, or altogether inconsistent with the Victor's Government: But in other Things, they commonly indulged unto the Conquered, the Laws and Religion of their Country upon a double Account, *viz.*

First, On Account of Humanity, thinking it a hard and over-severe Thing to impose presently upon the Conquered a Change of their Customs, which long Use had made dear to them. And, *2dly*, Upon the Account

of Prudence; for the *Romans* being a wise and experienced People, found that those Indulgences made their Conquests the more easy, and their Enjoyments thereof the more firm, when as a rigorous Change of the Laws and Religion of the People would render them in a restless and unquiet Condition, and ready to lay hold of any Opportunity of Defection or Rebellion, to regain their ancient Laws and Religion, which ordinary People count most dear to them; (though at this Day the Indulgence of a *Paganish* Religion is not used to be allowed by any Christian Victor, as is observed in *Calvin's* Case in the Seventh Report;) and to give One Instance for all, it was upon this Account, That though the *Romans* had wholly subdued *Syria* and *Palestina*, yet they allow'd to the Inhabitants the *Jews*, &c. the Use of their Religion and Laws, so far forth as consisted with the Safety and Security of the Victor's Interest: And therefore, though they reserved to themselves the Cognizance of such Causes as concern'd themselves, their Officers or Revenues, and such Cases as might otherwise disturb the Security of their Empire, as Treasons, Insurrections, and the like; yet 'tis evident they indulged the People of the *Jews*, &c. to judge by their own Law, not only of some Criminal Proceedings, but even of Capital in some Cases, as appears by the History of the Gospels, and Acts of the Apostles.

The *Romans* indulged the vanquish'd in their Laws and Religion.

Conqueſt upon Terms and Capitulations.

But ſtill this was but an Indulgence, and therefore was reſumable by the Victor, unleſs there intervened any Capitulation between the Conqueror and the Conquered to the contrary; which was frequent, eſpecially in thoſe Caſes, when it was not a compleat Conqueſt, but rather a Dedition upon Terms and Capitulations, agreed between the Conqueror and the Conquered; wherein uſually the yielding Party ſecured to themſelves, by the Articles of their Dedition, the Enjoyment of their Laws and Religion; and then by the Laws of Nature and of Nations, both which oblige to the Obſervation of Faith and Promiſes, thoſe Terms and Capitulations were to be obſerved. Again, *2dly*, When after a full Conqueſt, the conquered People reſumed ſo much Courage and Power as began to put them in a Capacity of regaining their former Laws and Liberties. This commonly was the Occaſion of Terms and Capitulations between the Conquerors and Conquered. Again, *3dly*, When by long Succeſſion of Time, the Conquered had either been incorporated with the conquering People, whereby they had worn out the very Marks and Diſcriminations between the Conquerors and Conquered; and if they continued diſtinct, yet by a long Preſcription, Uſage and Cuſtom, the Laws and Rights of the conquered People were in a manner ſettled, and the long Permiſſion of the Conquerors amounted to a tacite Conceſſion

ceſſion or Capitulation, for the Enjoyment of their Laws and Liberties.

But of this more than enough is ſaid, becauſe it will appear in what follows, That *William* I. never made any ſuch Conqueſt of *England*.

Conqueſt over the King, but not the People.

Secondly, Therefore I come to the Second Kind of Conqueſt, *viz.* That which is only *Victoria in Regem*: And this is where the Conqueror either has a real Right to the Crown or chief Government of a Kingdom, or at leaſt has, or makes ſome Pretence of Claim thereunto; and, in Purſuance of ſuch Claim, raiſes War, and by his Forces obtains what he ſo pretends a Title to. Now this kind of Conqueſt does only inſtate the Victor in thoſe Rights of Government, which the conquered Prince, or that Prince to whom the Conqueror pretends a Right of Succeſſion, had, whereby he becomes only a Succeſſor *Jure Belli*, but not a Victor or Conqueror upon the People; and therefore has no more Right of altering their Laws, or taking away their Liberties or Poſſeſſions, than the conquered Prince, or the Prince to whom he pretends a Right of Succeſſion, had; for the Intention, Scope and Effect of his Victory extends no further than the Succeſſion, and does not at all affect the Rights of the People. The Conqueror is, as it were, the Plaintiff, and the conquered Prince is the Defendant, and the Claim is

a Claim of Title to the Crown; and because each of them pretends a Right to the Sovereignty, and there is no other competent Trial of the Title between them, they put themselves upon the great Trial by Battle; wherein there is nothing in Question touching the Rights of the People, but only touching the Right of the Crown, and that being decided by the Victory, the Victor comes in as a Successor, and not *Jure Victoriæ*, as in relation to the Peoples Rights, the most Sacred whereof are their Laws and Religion.

Indeed, those that do voluntarily assist the conquered Prince, commonly undergo the same Hazard with him, and do, as it were, put their Interest upon the Hazard and Issue of the same Trial, and therefore commonly fall under the same Severity with the Conquered, at least *de facto*; because, perchance the Victor thinks he cannot be secure without it. But yet Usage, and indeed common Prudence, makes the Conquerors use great Moderation and Discrimination in relation to the Assistants of the conquered Prince; and to extend this Severity only to the eminent and busy Assistants of the Conquered, and not to the *Gregarii*, or such as either by Constraint or by Necessity were enforced to serve against him; and as to those also, on whom they exercise their Power, it has been rarely done *Jure Belli aut Victoriæ*, but by a judiciary Proceeding, as in Cases of Treason, because now the great Trial by Battle has pronounced for the Right of the Conqueror,

queror, and at best no Man must dare to say otherwise now, whatsoever Debility was in his Pretension or Claim. We shall see the Instances hereof in what follows.

Thirdly, As to the Third Point, How the Laws of *England* stood at the Entry of King *William* I. And it seems plain, that at the Time of his Entry into *England*, the Laws, commonly call'd, *The Laws of* Edward *the Confessor*, were then the standing Laws of the Kingdom. *Hoveden* tells us, in a Digression under his History of King *Henry* II. that those Laws were originally put together by King *Edgar*, who was the Confessor's Grandfather, *viz. Verum tamen post mortem ipsius Regis* Edgari *usq; ad Coronationem Sancti Regis* Edvardi *quod Tempus Continet Sexaginta & Septem Annos prece (vel pretio) Legei sopitæ sunt & tus prætermissæ sed postquam Rex* Edvardus *in Regno fuit sublimatus Concilio Baronum Angliæ Legem Annos Sexaginta & Septem Sopitam, excitavit & confirmavit, & ea Lex sic confirmata vocata est Lex Sancti* Edvardi, *non quod ipse prius invenisset eam sed cum prætermissa fuisset & oblivioni penitus dedita a morte avi sui Regis* Edgari *qui primus inventor ejus fuisse dicitur usque ad sua Tempora, viz. Sexaginta & Septem Annos.* And the same Passage in *totidem Verbis* is in the History of *Lichfield*, cited in Sir *Robert Twisden*'s Prologue to the Laws of King *William* I. But although possibly those Laws were collected by King *Edgar*, yet it is evident, by what is before said, they were augmented by the Confessor, by that Ex-

3d. Question. How the Laws stood at W. I.'s Entry.

tract of Laws before-mentioned, which he made out of that Threefold Law, that obtain'd in several Parts of *England*, *viz.* The *Danish*, the *Mercian*, and the *West-Saxon* Laws.

This Manual (as I may call it) of Laws, stiled, *The Confessor's Laws*, was but a small Volume, and contains but few Heads, being rather a Scheme or Directory touching some Method to be observed in the Distribution of Justice, and some particular Proceedings relative thereunto, especially in Matters of Crime, as appears by the Laws themselves, which are now printed in Mr. *Lambart's Saxon* Laws, p. 133. and other Places; yet the *English* were very zealous for them, no less or otherwise than they are at this Time for the *Great Charter*; insomuch, that they were never satisfied till the said Laws were reinforced and mingled for the most Part with the Coronation Oath of King *William* I. and some of his Successors.

And this may serve shortly touching this Third Point, whereby we see that the Laws that obtain'd at the Time of the Entry of King *William* I, were the *English* Laws, and principally those of *Edward* the Confessor.

4th. Question. What kind of Conquest *William* I. made.

Fourthly, The Fourth Particular is, The Pretensions of King *William* I. to the Crown of *England*, and what kind of Conquest he made; and this will be best rendered and understood by producing the History of that Business, as it is delivered over to us by the ancient Historians that lived in or near that

that Time: The Sum, or *Totum* whereof, is this.

King *Edward* the Confessor having no Children, nor like to have any, had Three Persons related to him, whom he principally favoured, *viz.* 1*st*, *Edgar Ætheling*, the Son of *Edward*, the Son of *Edmond Ironside*, *Mat. Paris*, *Anno* 1066. *Edmundus autem latus ferreum Rex naturalis de stirpe Regum genuit* Edwardum *&* Edwardus *genuit* Edgarum *cui de jure debebatur Regnum Anglorum.* 2*dly*, *Harold*, the Son of *Goodwin*, Earl of *Kent*, the *Confessor's* Father-in-Law, he having married Earl *Goodwin's* Daughter: And, 3*dly*, *William* Duke of *Normandy*, who was allied to the Confessor thus, *viz.* *William* was the Son of *Robert*, the Son of *Richard* Duke of *Normandy*, which *Richard* was Brother unto the Confessor's Mother. *Vide* Hoveden, *sub initio Anni primi Willielmi primi.*

There was likewise a great Familiarity, as well as this Alliance, between the Confessor and Duke *William*; for the Confessor had often made considerable Residencies in *Normandy*. And this gave a fair Expectation to Duke *William* of succeeding him in this Kingdom: And there was also, at least pretended, a Promise made him by the *Confessor*, That Duke *William* should succeed him in the Crown of *England*; and because *Harold* was in great Favour with the King, and of great Power in *England*, and therefore the likeliest Man by his Assistance to advance, or by his Opposition to hinder or emperate the Duke's Expectation, there

Three Competitors for the Crown of *England*.

was a Contract made between the Duke and *Harold* in *Normandy* in the *Confessor*'s Life-time, That *Harold* should, after the *Confessor*'s Death, assist the Duke in obtaining the Crown of *England*. (*Vide Brompton, Hoveden, &c.*) Shortly after which the *Confessor* died, and then step'd up the Three Competitors to the Crown, *viz.*

1. *Edgar Ætheling*, who was indeed favoured by the Nobility, but being an Infant, was overborn by the Power of *Harold*, who thereupon began to set up for himself: Whereupon *Edgar*, with his Two Sisters, fled into *Scotland*; where he, and one of his Sisters, dying without Issue, *Margaret*, his other Sister and Heir, married *Malcolm*, King of *Scots*; from whence proceeded the Race of the *Scottish* Kings, *and from whom Her present Majesty Queen* Anne *is derived in a direct and uninterrupted Line.*

2. *Harold*, who having at first raised a Power under Pretence of supporting and preserving Duke *William*'s Title to this Kingdom, and having by Force suppress'd *Edgar*, he thereupon claimed the Crown to himself; and pretending an Adoption or Bequest of the Kingdom unto him by the Confessor, he forgot his Promise made to Duke *William*, and usurped the Crown, which he held but the Space of 9 Months and 4 Days, *Hoveden*.

3. *William*, Duke of *Normandy*, who pretended a Promise of Succession by the *Confessor*, and a Capitulation or Stipulation by *Harold* for his Assistance; and had, it seems,

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so far interested the Pope in Favour of his Pretensions, that he pronounced for *William*, against both the others.

Hereupon the Duke makes his Claim to the Crown of *England*, gathered a powerful Army, came over, and upon the 14th of *October*, *Anno* 1067. gave *Harold* Battle, and overthrew him at that Place in *Sussex*, where *William* afterwards founded *Battle-Abbey*, in Memory of that Victory; and then he took upon him the Government of the Kingdom, as King thereof, and upon *Christmas* following was solemnly crown'd at *Westminster* by the Archbishop of *York*; and he declared at his Coronation, That he claimed the Crown not *Jure Belli*, but *Jure Successionis*; and *Brompton* gives us this Account thereof, *Cum nomen Tyranni exhorresceret & nomen legitimi principis inducere vellet petiit consecrari*; and accordingly, says the same thor, the Archbishop of *York*, in respect of some present Incapacity in the Archbishop of *Canterbury*, *Munus hoc adimpleuit ipsumq; Gulielmum Regem ad jura Ecclesiæ Anglicanæ tuenda, & conservanda, populumque suum rectè regendum, & Leges rectas Statuendum, Sacramento solemniter adstrinxit*; and thereupon he took the Homage of the Nobility.

This being the true, though short Account of the State of that Business, there necessarily follows from thence those plain and unquestionable Consequences.

First, That the Conquest of King *William* I. was not a Conquest upon the Country 1.

try or People, but only upon the King of it, in the Person of *Harold*, the Usurper; for *William* I. came in upon a Pretence of Title of Succession to the *Confessor*; and the Prosecution and Success of the Battle he gave to *Harold* was to make good his Claim of Succession, and to remove *Harold*, as an unlawful Usurper upon his Right; which Right was now decided in his Favour, and determined by that great Trial by Battle.

2. *Secondly*, That he acquired in Consequence thereof no greater Right than what was in the *Confessor*, to whom he pretended a Right of Succession; and therefore could no more alter the Laws of the Kingdom upon the Pretence of Conquest, than the *Confessor* himself might, or than the Duke himself could have done, had he been the true and rightful Successor to the Crown, in Point of Descent from the *Confessor*; neither is it material, whether his Pretence were true or false, or whether, if true, it were available or not, to entitle him to the Crown; for whatsoever it was, it was sufficient to direct his Claim, and to qualify his Victory so, that the *Jus Belli* thereby acquired could be only *Victoria in Regem, sed non in Populum*, and put him only in the State, Capacity and Qualification of a Successor to the King, and not as Conqueror of the Kingdom.

3. *Thirdly*, And as this his antecedent Claim kept his Acquest within the Bounds of a Successor, and restrained him from the unlimited

limited Bounds and Power of a Conqueror; so his subsequent Coronation, and the Oath by him taken, is a further unquestionable Demonstration, that he was restrain'd within the Bounds of a Successor, and not enlarged with the Latitude of a Victor; for at his Coronation, he binds himself by a Solemn Oath to preserve the Rights of the Church, and to govern according to the Laws, and not absolutely and unlimittedly according to the Will of a Conqueror. Coronation Oath.

Fourthly, That if there were any Doubt whether there might be such a Victory as might give a Pretension to him, of altering Laws, or governing as a Conqueror; yet to secure from that possible Fear, and to avoid it, he ends his Victory in a Capitulation; namely, he takes the ancient Oath of a King unto the People, and the People reciprocally giving or returning him that Assurance that Subjects ought to give their Prince, by performing their Homage to him as their King, declared by the Victory he had obtain'd over the Usurper, to be the Successor of the *Confessor*: And consequently, if there might be any Pretence of Conquest over the Peoples Rights, as well as over *Harold's*, yet the Capitulation or Stipulation removes the Claim or Pretence of a Conqueror, and enstates him in the regulated Capacity and State of a Successor. And upon all this it is evident, That King *William* I. could not abrogate or alter the ancient Laws of the Kingdom, any more than if he 4.

he had succeeded the *Confessor* as his lawful Heir, and had acquir'd the Crown by the peaceable Course of Descent, without any Sword drawn.

And this much may suffice, to shew that King *William* I. did not enter by such a Right of Conquest, as did or could alter the Laws of this Kingdom.

5th. Question. Whether *W.* I. alter'd the Laws.

Therefore I come to the last Question I proposed to be considered, *viz.* Whether *de Facto* there was any Thing done by King *William* I. after his Accession to the Crown, in reference either to the Alteration or Confirmation of the Laws, and how and in what Manner the same was done: And this being a Narrative of Matters of Fact, I shall divide into those Two Inquiries, *Viz.* 1*st*. What was done in relation to the Lands and Possessions of the *English*: And 2*dly*. What was done in relation to the Laws of the Kingdom in general; for both of these will be necessary to make up a clear Narrative touching the Alteration or Suspension, Confirmation or Execution of the Laws of this Kingdom by him.

1. *First*, Therefore touching the former, *viz.* What was done in relation to the Lands and Possessions of the *English*. Those Two Things must be premised, *viz.* First, a Matter of Right, or Law; which is this, That in case this had been a Conquest upon the Kingdom, it had been at the Pleasure of the Conqueror to have taken all the Lands of the Kingdom into his own Possession, to have put a Period to all former Titles,

Titles, to have cancelled all former Grants, and to have given, as it were, the Date and Original to every Man's Claim, so as to have been no higher nor ancienter than such his Conquest, and to hold the same by a Title derived wholly from and under him. I do not say, that every absolute Conqueror of a Kingdom will do thus, but that he may if he will, and have Power to effect it.

Secondly, The Second Thing to be premised is, a Matter of Fact, which is this; That Duke *William* brought in with him a great Army of Foreigners, that would have expected a Reward of their Undertaking, and therefore were doubtless very craving and importunate for Gratifications to be made them by the Conqueror. *Again*, it is very probable, that of the *English* themselves there were Persons of very various Conditions and Inclinations; some perchance did adhere to the Duke, and were Assistant to him openly, or at least under-hand, towards the bringing him in; and those were sure to enjoy their Possessions privately and quietly when the Duke prevailed. *Again*, some did without all Question adhere to *Harold*, and those in all probability were severely dealt with, and dispossess'd of their Lands, unless they could make their Peace. *Again*, possibly there were others who assisted *Harold*, partly out of Fear and Compulsion; yet those, possibly, if they were of any Note or Eminence, fared little better than the rest. *Again*, there were some that pro-

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probably ſtood Neuters, and medled not; and thoſe, though they could not expect much Favour, yet they might in Juſtice expect to enjoy their own. *Again*, it muſt needs be ſuppoſed, That the Duke having ſo great an Army of Foreigners, ſo many Ambitious and Covetous Minds to be ſatisfied, ſo many to be rewarded in Point of Gratitude; and after ſo great a Concuſſion as always happens upon the Event of a Victory, it muſt needs, upon thoſe and ſuch-like Accounts, be evident to any Man that conſiders Things of this Nature, that there were great Outrages and Oppreſſions committed by the Victor's Soldiers and their Officers, many falſe Accuſations made againſt innocent Perſons, great Diſturbances and Evictions of Poſſeſſions, many right Owners being unjuſtly thrown out, and conſequently many Occupations and Uſurpations of other Men's Rights and Poſſeſſions, and a long while before thoſe Things could be reduced to any quiet and regular Settlement.

What was done after the Conqueſt.

Theſe general Obſervations being premiſed, we will now ſee what *de Facto* was done in relation to Men's Poſſeſſions, in Conſequence of this Victory of the Duke.

1. *Firſt*, It is certain that he took into his Hands all the Demeaſn Lands of the Crown which were belonging to *Edward the Confeſſor* at the Time of his Death, and avoided all the Diſpoſitions and Grants thereof

made by *Harold*, during his ſhort Reign; and this might be one great End of his making that Noble Survey in the Fourth Year of his Reign, called generally *Doomſday-Read*, in ſome Records, as *Rot. Winton*, *&c.* thereby to aſcertain what were the Poſſeſſions of the Crown in the Time of the *Confeſſor*, and thoſe he entirely reſumed: And this is the Reaſon why in ſome of our old Books it is ſaid, *Ancient Demeaſn* is that which was held by King *William* the Conqueror; and in others 'tis ſaid, *Ancient Demeaſn* is that which was held by King *Edward the Confeſſor*, and both true in their Kind; and in this Reſpect, *viz.* That whatſoever appeared to be the *Confeſſor*'s at the Time of his Death, was aſſumed by King *William* into his own Poſſeſſion.

Secondly, It is alſo certain, That no Perſon ſimply, and *quatenus* an *Engliſh* Man, was diſpoſſeſs'd of any of his Poſſeſſions, and conſequently their Land was not pretended unto as acquired *Jure Belli*, which appears moſt plainly by the following Evidences, *viz.* 2.

Firſt, That very many of thoſe Perſons that were poſſeſſed of Lands in the Time of *Edward* the Confeſſor, and ſo returned upon the Book of *Doomſday*, retain'd the ſame unto them and their Deſcendants, and ſome of their Deſcendants retain the ſame Poſſeſſions to this Day, which could not have been, if preſently *Jure Belli ac Victoriæ*

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universalis, the Lands of the *English* had been vested in the Conqueror. And again,

Secondly, We do find, that in all Times, even suddenly after the Conquest, the Charters of the ancient *Saxon* Kings were pleaded and allowed, and Titles made and created by them to Lands, Liberties, Franchises, and Regalities, affirm'd and adjudged under *William* I. Yea, when that Exception has been offered, That by the Conquest those Charters had lost their Force, yet those Claims were allowed as in 7 *E.* 3. *Fines*, as mentioned by Mr. *Selden*, in his Notes upon *Eadmerus*, which could not be, if there had been such a Conquest as had vested all Mens Rights in the Conqueror.

Thirdly, Many Recoveries were had shortly after this Conquest, as well by Heirs as Successors of the Seizin of their Predecessors before the Conquest. We shall take one or two Instances for all; namely, that famous Record *apud Pinendon*, by the Archbishop of *Canterbury*, in the Time of King *William* I. of the Seizin and Title of his Predecessors before the Conquest: See the whole Process and Proceedings thereupon in the End of Mr. *Selden*'s Notes upon *Eadmerus*; and see *Spelman*'s *Glossary*, Title *Drenches*. Upon these Instances, and much more that might be added, it is without Contradiction, That the Rights and Inheritances of the *English qua Tales*, were not abrogated or impeach'd by this Conquest, but continued notwithstanding the same; for, as is before observ'd, it was *Jure Belli quoad Regem, sed non quoad Populum.*

What Persons *William* I. dispossessed.

But to descend to some Particulars: The *English* Persons that the Conqueror had to deal with, were of Three Kinds, *viz. First*, Such as adhered to him against *Harold* the Usurper; and, without all Question, those continued the Possession of their Lands, and their Possessions were rather encreased by him, than any way diminished. *Secondly*, Such as adhered to *Harold*, and opposed the Duke, and fought against him; and doubtless, as to those, the Duke after his Victory used his Power, and dispossess'd them of their Estates: Which Thing is usual upon all Conclusions and Events of this Kind, upon a double Reason; *1st*, To secure himself against the Power of those that oppos'd him, and to weaken them in their Estates, that they should not afterwards be enabled to make Head against him. And, *2dly*, To gratifie those that assisted him, and to reward their Services in that Expedition; and to make them firm to his Interest, which was now twisted with their own: For it can't be imagined, but that the Conqueror was assisted with a great Company of Foreigners, some that he favour'd, some that had highly deserved for their Valour, some that were necessitous Soldiers of Fortune, and others that were either ambitious or covetous: All whose Desires, Deserts, or Expectations, the Conqueror had no other Means to satisfie, but by the Estates of such as had appeared open Enemies to him; and doubtless, many innocent Persons suffered in this Kind, under false

Suggestions and Accusations, which occasioned great Exclamations by the Writers of those Times against the Violencies and Oppressions which were used after this Victory. And, *Thirdly*, Such as stood Neuters, and meddled not on either Side during the Controversie: And doubtless, for some Time after this great Change, many of those suffered very much, and were hardly used in their Estates, especially such as were of the more Eminent Sort.

Gervasius Tilburiensis, who wrote in the Time of *Hen.* II. *Libro* 1° *Cap. Quid Mundum & quare sic dictum*, gives us a large Account of what he had traditionally learned touching this Matter, to this Effect, viz. *Post Regni* Conquisitionem *& Perdomitam Subjectionem*, &c. *Nomine autem Successionis a temporibus* subactæ Gentis *nihil sibi Vendicarent*, &c. *i. e.* After the Conquest of the Kingdom, and Subjection of the Rebels, when the King himself and his great Men had surveyed their new Acquisitions; and strict Inquiry was made, who there were that, fighting against the King, had saved themselves by Flight: From these, and the Heirs of such as were slain in Battle, fighting against him, all hopes of Succession, or of possessing their Estates; for the People being subdued, they held their Lives as a Favour, *&c.*

But *Gervase*, as he speaks so liberally in relation to the Conquest, and the *Subacta Gens* as he terms us; so it should seem, he was in great Measure mistaken in this Relation:

lation: For it is most plain, That those that were not engaged visibly in the Assistance of *Harold*, were not, according to the Rules of those Times, disabled to enjoy their Possessions, or make Title of Succession to their Ancestors, or transmit to their Posterity as formerly, tho' possibly some Oppressions might be used to particular Persons here and there to the contrary. And this appears by that excellent Monument of Antiquity, set down in Sir *H. Spelman's Glossary*, in the Title of *Drenches* or *Drenges*, which I shall here transcribe, *viz.*

Lands of Neuters not Forfeited.

Edwinus de Sharborne, *Et quidam alii qui ejecti fuerunt & Terris suis abierunt ad conquestorem & dixerunt ei, quod nunquam ante conquestum nec in conquestum nec post, fuerunt contra Regem ipsum in Concilio aut in auxilio sed tenuerint se in pace; Et hoc parati sunt probare qualiter Rex vellet Ordinare, Per quod idem Rex fecit Inquiri per totam Angliam si ita fuit, quod quidem probatum fuit, propter quod idem Rex præcepit ut omnes illi qui sic tenuerunt se in pace in forma prædicta quod ipsi rehabetent omnes Terras & Dominationes suas adeo integre & in pace ut unquam habuerint vel tenuerunt ante conquestum suum, Et quod ipsi in posterum vocarentur Drenges.*

Church Lands not Confiscated.

But it seems the Possessions of the Church were not under this Discrimination, for they being held not in Right of the Person, but of the Church, were not subject to any Confiscation by the Adherence of the

Poſſeſſor to *Harold* the Uſurper: And therefore, tho' it ſeems *Stigand* Archbiſhop of *Canterbury*, at the coming in of *William* I. had been in ſome Oppoſition againſt him, which probably might be the true Cauſe why he perform'd not the Office of his Coronation, which of Right belonged to him, tho' ſome other Impediments were pretended, *Vide Eadmerus in initio Libri*, and might alſo poſſibly be the Reaſon why a conſiderable part of his Poſſeſſions were granted to *Odo* Biſhop of *Bayonne*, but were afterwards recovered by *Lanfrank*, his Succeſſor, at *Pinendon*, *in pleno Comitatu*, *ubi Rex præcepit* totum Comitatum *abſque mora conſidere*, *& homines Comitatûs omnes Francigenos & præcipue Anglos in antiquis Legibus & Conſuetudinibus peritos*, *in unum convenire*.

To this may be added thoſe ſeveral Grants and Charters made by King *William* I. mentioned in the Hiſtory of *Ely*, and in *Eadmerus*, for Reſtoring to Biſhopricks and Abbies ſuch Lands, or Goods, as had been taken away from them, *viz.*

Charters for reſtoring Lands to Churches &c.

Willielmus Dei gratiâ Rex Anglorum, Lanfranco Archiepiſcopo Cantuar' & Galfrido Epiſcopo Conſtantiarum & Roberto Comiti de eu & Richardo filio Comitis Gileberti & Hugoni de Monteforti, ſuiſque aliis proceribus Regni Angliæ ſalutem. Summonete Vicecomites meos ex meo præcepto, & ex parte mea eis dicite ut reddant Epiſcopatibus meis & Abbatiis totum Dominium omneſque Dominicas terras quas de Dominio Epiſcopatuum meorum, & Abbatiarum, Epiſcopi mei & Abbates

Abbates eis vel lenitate vel timore vel cupiditate dederunt vel habere conſenſerunt vel ipſi violentia ſua inde abſtraxerunt, & quod hactenus injuſte poſſiderunt de Dominio Eccleſiarum mearum. Et niſi reddiderint ſicut eos ex parte mea ſummonebitis, vos ipſos velint nolint, conſtringite reddere; Et quod ſi quilibet alius vel aliquis veſtrum quibus hanc Juſtitiam impoſui ejuſdem querelæ *fuerit reddat ſimiliter quod de Domino Epiſcopatuum vel Abbatiarum mearum habuit ne propter illud quod inde aliquis veſtrum habebit, minus exerceat ſuper meos Vicecomites vel alios, quicunque teneant Dominium Eccleſiarum mearum, quod Præcipio, &c.*

Willielmus Rex Anglorum omnibus ſuis fidelibus ſuis & Vicecomitibus in quorum Vicecomitatibus Abbatia de Heli Terras habet ſalutem. Præcipio ut Abbatia pred. habeat Omnes conſuitudines ſuas ſcilicet Saccham & Socham Toll & Team & Infanganetheof, Hamſocua & Grithbrice Fithwite & Ferdwite infra Burgum & extra & omnes alias forisfacturas in terra ſua ſuper ſuos homines ſicut habuit Die qua Rex Edwardus *fuit* vivus & mortuus, *& ſicut mea juſſione* dirationatæ *apud* Keneteford *per* plures Scyras *ante meos Barones,* viz. *Galfridum Conſtantienſem Ep. & Baldewine Abbatem,* &c. *Teſte Rogero Bigot.*

Willielmus Rex Angl. Lanfranco Archiepo, & Rogero Comiti Moritoniæ, & Galfrido Conſtantien Epo. ſalutem. Mando vobis & Præcipio ut iterum faciatis congregari omnes Scyras quæ interfuerunt placito habito de Terris Eccleſia de Heli, antequam mea conjux in Normaniam noviſſime veniret, cum quibus etiam ſint de Baronibus meis, qui competenter adeſſe poterint &

prædicto placito interfuerint & qui terras ejusdem Ecclesiæ tenent; Quibus in unum congregatis eligantur plures de illis Anglis *qui sciunt quomodo Terræ jacebant præfatæ Ecclesiæ Die qua Rex Edwardus Obiit, & quod inde dixerint ibidem jure jurando testentur; quo facto restituentur Ecclesiæ terræ quæ in Dominico suo erant die obitus Regis Edwardi; Exceptis his quas homines clamabant me sibi dedisse; illas vero Literis mihi significate quæ sint, & qui eas tenent; Qui autem tenent Theinlandes quæ proculdubio debent teneri de Ecclesia faciant concordiam cum Abbate quam Meliorem poterint, & si noluerunt terræ remaneant ad Ecclesiam, Hoc quoque detinentibus Socham & Saccam fiat, &c.*

Willielmus Rex Anglorum, Lanfranco Archiepisc', & G. Episc. & R. Comiti M. salutem, &c. Defendite ne Remigius Episcopus novas consuetudines requirat *infra Insulam de Heli, Nolo enim quod ibi habeat* nisi illud quod Antecessor ejus habebat Tempore Regis Edwardi *Scilicet qua die ipse Rex mortuus est. Et si Remig. Episcopus inde* Placitare voluerit placitet inde sicut fecisset tempore *Regis Edw. &* placitum istum sit in vestra *præsentia; De custodia de Norguic Abbatem Simeonem quietum esse demittite; Sed ibi municipem suam conduci faciat & custodiri. Facite* remanere placitum de Terris *quas Calumniantur Willielmus de ou, & Radulphus filius Gualeranni, & Robertus Gernon; si inde* placitare noluerint *sicut* inde placitassent tempore Regis Edwardi, *& sicut in eodem tempore Abbatia* consuetudines suas *habebat, Volo ut eas omnino faciatis* habere *sicut Abbas per* Char-

tas

eas fuas, & per Teſtes ſuos eas deplacitare poterit.

I might add many more Charters to the foregoing, and more eſpecially thoſe famous Charters in *Spelman's* Councils, *Vol.* 2. *Fol.* 14. & 165. whereby it appears, That King *William* I. *Communi Conſilio, & Conſilio Archiepiſcoporum, Epiſcoporum & Abbatum, & omnium Principum & Baronum Regni*, inſtituted the Courts for holding Pleas of Eccleſiaſtick Cauſes, to be ſeparate and diſtinct from thoſe Courts that had Juriſdiction of Civil Cauſes. *Sed de his pluſquam ſatis.* Eccleſiaſtical Juriſdiction ſeperated from the Temporal

And thus I conclude the Point I firſt propounded, *viz.* How King *William* I. after his Victory, dealt with the Poſſeſſions of the *Engliſh*, whereby it appears that there was no Pretence of an Univerſal Conqueſt, or that he was a Victor *in Populum*; neither did he claim the Title of *Engliſh* Lands upon that Account, but only made uſe of his Victory thus far, to ſeize the Lands of ſuch as had oppoſ'd him: Which is univerſal in all Caſes of Victories, tho' without the Pretence of Conqueſt.

Secondly, Therefore I come to the Second general Queſtion, *viz.* What was done in relation to the Laws? It is very plain, that the King, after his Victory, did, as all wiſe Princes would have done, endeavour to make a ſtricter Union between *England* and *Normandy*; and in order thereunto, he endeavoured to bring in the *French* inſtead of the *Saxon* Language, then uſed in *England*: *Deliberavit* 2d Queſtion.

William I. Endeavoured a Union, in the Language and Laws of *England* and *Normandy*.

liberavit (says *Holcot*) *quatenus Linguam Saxonicam posset destruere, & Anglicam & Normanicam idiomate concordare & ideo ordinavit quod nullus in Curia Regis placitaret nisi in Lingua Gallica, &c.* From whence arose the Practice of Pleading in our Courts of Law in the *Norman* or *French* Tongue, which Custom continued till the Statute of 36 *E.* 3. *c.* 15.

And as he thus endeavoured to make a Community in their Language, so possibly he might endeavour to make the like in their Laws, and to introduce the *Norman* Laws into *England*, or as many of 'em as he thought convenient; and it is very probable, that after the Victory, the *Norman* Nobility and Soldiers were scattered through the whole Kingdom, and mingled with the *English*, which might possibly introduce some of the *Norman* Laws and Customs insensibly into this Kingdom; and to that End, the Conqueror did industriously mingle the *English* and *Normans* together, shuffling the *Normans* into *English* Possessions here, and putting the *English* into Possessions in *Normandy*, and making Marriages among them, especially between the Nobility of both Nations.

This gave the *English* a Suspicion, that they should suddenly have a Change of their Laws before they were aware of it: But it fell out much better: For first, there arising some Danger of a Defection of the *English*, countenanced by the Archbishop of *York* in the *North*, and *Frederick*, Abbot of St. *Albans* in the *South*; the King, by the Persuasions of *Lanfrank*, Archbishop of *Canterbury*, *Pro bono pacis*

pacis apud Berkhamstead juravit super Animas reliquias Sancti Albani tactisque Sacrosanctis Evangeliis (ministrante juramento Abbate Frederico) ut bonas & approbatas antiquas Regni Leges quas sancti & pii Angliæ Reges ejus Antecessores, & maxime Rex Edwardus statuit inviolabiliter observaret; Et sic pacificati ad propria læti recesserunt. Vide. Mat. Paris in Vita Frederici Abbatis Sancti Albani.

The English Laws Confirmed.

But altho' now, upon this Capitulation, the ancient *English* Laws were confirm'd, and namely, the Laws of St. *Edward* the *Confessor*; yet it appeared not what those Laws were: And therefore, in the Fourth Year of his Reign, we are told by *Hoveden*, in a Digression he makes in his History under the Reign of King *Hen.* II. and also in the Chronicle of *Litchfield.*

Willielmus Rex, Anno quarto Regni sui Consilio Baronum suorum fecit Summonari per Universos Consulatos Angliæ, Anglos Nobiles & Sapientes & sua Lege eruditos ut eorum jura & consuetudines ab ipsis audiret, Electis igitur de singulis totius Patriæ Comitatibus viri duodecim, jurejurando confirmaverunt ut quoad possint recto tramite neque ad Dextram neque ad Sinistram partem divertentes Legum suarum consuetudinem & sanctam patefacerent nihil prætermittentes nihil addentes, nihil prævaricando mutantes, &c. And then sets down many of those ancient Laws approv'd and confirm'd by the King, and *Commune Concilium*; wherein it appears, that he seems to be most pleased with those Laws that came under the Title of *Lex Danica*, as most consonant to the *Norman* Customs.

Qu

Quæ audita non averterſi compatriotæ qui Leges dixerunt Triſtes effecti, imo miniſterio deprecandi ſunt quatenus permitterent Leges ſibi proprias & conſuetudinis antiquæ habere in quibus viverunt Patres, & ipſi in ea nati & nutriti ſunt, quia durum Valde ſibi foret ſuſcipere Leges ignotas, & judicare de iis quæ neſciebant; *Rege vero ad flectendum ingrato exiſtente, tandem eum perſecuti ſunt deprecantes quatenus pro Anima Regis Edwardi qui eas ſub diem ſuum eis conceſſerat Barones & Regnum & cujus erant Leges non aliorum extraneorum cogere quam ſub Legibus perſeverare patriis; Unde Conſilio habito Precatui Baronum tandem acquievit,* &c.

The Confeſſor's Laws Confirmed.

Gervaſius Tilburienſis, who lived nearer that Time, ſpeaks ſhortly, and to the Purpoſe, thus: *Propoſitis Legibus Anglicanis ſecundum triplicitatem earum Diſtinctionem, i. e.* Merchen-lage, Weſtſaxon-lage, & Dane-lage *quaſdam earum reprobans quaſdam autem approbans, illis tranſmarinas Leges Neuſtriæ quas ad Regni Pacem tuendam efficaciſſimæ videbantur, adjecit.*

So that by this, there appears to have been a double Collection of Laws, *viz.*

Firſt, The Laws of the *Confeſſor*, which were granted and confirmed by King *William*, and are alſo called the Laws of King *William*, which are tranſcribed in Mr. *Selden's* Notes upon *Eadmerus*, Page 173. the Title whereof is thus, *viz. Hæ ſunt Leges & Conſuetudines quas Willielmus Rex conceſſit univerſæ populo Angliæ poſt ſubactam Terram eadem ſunt quas Edwardus Rex cognatus ejus obſervavit ante eum*: And theſe ſeem to be the very

very same that *Ingulfus* mentions to have been brought from *London*, and placed by him in the Abbey of *Crowland* in the Fifteenth Year of the same King *William*, *attuli eadem Vice mecum Londini in meum Monasterium Legum Volumen*, &c.

Secondly, There were certain additional Laws at time establish'd, which *Gervasius Tilburiensis* calls, *Leges Neustriæ quæ efficacissimæ videbantur ad tuendam Regni pacem*; which seems to be included in those other Laws of King *William* transcribed in the same Notes upon *Eadmerus*, Page 189, 193, &c. which indeed were principally designed for the Establishment of King *William* in the Throne, and for the securing of the Peace of the Kingdom, especially between the *English* and *Normans*, as appears by these Instances, *viz.* And others added.

The Law *de Murdro*, or the Common Fine for a *Norman* or *Frenchman* slain, and the Offender not discovered: The Law for the Oath of Allegiance to the King: The Introduction of the Trial by single Combat, which many Learned Men have thought was not in Use herein *England* before *William* I. And the Law touching Knights Service, which *Bracton*, *Lib.* 2. supposes to be introduced by the Conqueror, *viz.* *Quod omnes Comites Milites & Servientes & universi liberi homines totius Regni habeant & teneant se semper bene in Armis & in Equis ut decet & quod sint semper prompti & bene parati ad Servitium suum integrum nobis explendum & peragendum cum opus fuerit secundum quod nobis de Feodo debent & Tenementis suis de Jure facere*

cere & ſicut illis ſtatuimus per Commune Concilium totius Regni noſtri prædicti, & illis dedimus & conceſſimus in Feodo jure hæreditario. Wherein we may obſerve, that this Conſtitution ſeems to point at Two Things, *viz.* The aſſizing of Men for Arms, which was frequent under the Title *De aſſidenda ad Arma*, and is afterwards particularly enforc'd and rectified by the Statute of *Winton*, 13 *E.* 1. and next of Conventional Services reſerved by *Tenures* upon Grants made out of the Crown or Knights Service, called in Latin, *Forinſecum*, or *Regale Servitium*.

And *Note*, That theſe Laws were not impoſed *ad Libitum Regis*, but they were ſuch as were ſettled *per Commune Concilium Regni*, and poſſibly at that very Time when Twelve out of every County were return'd to aſcertain the *Confeſſor*'s Laws, as before is mentioned out of *Hoveden*, which appears to be as ſufficient and effectual a Parliament as ever was held in *England*.

By all which it is apparent, *Firſt*, That *William* I. did not pretend, nor indeed could he pretend, notwithſtanding this Nominal Conqueſt, to alter the Laws of this Kingdom without common Conſent *in Communi Concilio Regni*, or in Parliament. And, *Secondly*, That if there could be any Pretence of any ſuch Right, or if in that turbulent Time ſomething of that Kind had happened; yet by all thoſe ſolemn Capitulations, Oaths, and Conceſſions, that Pretence was wholly avoided, and the ancient Laws of the Kingdom ſettled, and were not to be altered, or added

added unto, at the Pleasure of the Conqueror, without Consent in Parliament.

In the Seventeenth Year of his Reign, (or as some say, the Fifteenth) he began that great Survey, recorded in Two Books, called, *The Great Doomsday Book*, and *Little Doomsday Book*, and finished it in the Twentieth Year of his Reign, *Anno Domini* 1086. as appears by the learned Preface of Mr. *Selden* to *Eadmerus*, and indeed by the Books themselves. The Original Record of which is still extant, remaining in the Custody of the Vice-Chamberlains of Her Majesties *Exchequer*. This Record contains a Survey of all the ancient Demeasn Lands of the Kingdom, and contains in many Manors, not only the Tenants Names, with the Quantity of Lands and their Values, but likewise the Number and Quality of the Resients or Inhabitants, with divers Rights, Privileges, and Customs claimed by them; and being made and found by Verdict or Presentment of Juries in every Hundred or Division upon their Oaths, there was no Receeding from, or Avoiding what was written in this Record: And therefore as *Gervasius Tilburiensis* says, Page 41. *Ob hoc nos eundem Librum* Judiciarium *Nominamus; Non quod in eo de propositis aliquibus dubiis feratur sententia, sed quod ab eo sicut ab ultimo Die Judicii non licet ulla ratione discedere.*

And thus much shall suffice touching the Fifth General Head; namely, of the Progress made after the Coming in of King *William*,

William, relating to the Laws of *England*, their Establishment, Settlement, and Alteration. If any one be minded to see what this Prince did in reference to Ecclesiasticks, let him consult *Eadmerus*, and the Learned Notes of Mr. *Selden* upon it, especially Page 167, 188, *&c.* where he shall find how this King divided the Episcopal Consistory from the County Court, and how he restrain'd the Clergy and their Courts from exercising Ecclesiastical Jurisdiction upon Tenants in *Capite*.

CHAP.

CHAP. VI.

Concerning the Parity or Similitude of the Laws of England *and* Normandy, *and the Reasons thereof.*

THE great Similitude that in many Things appears between the Laws of *England*, and those of *Normandy*, has given some Occasion to such as consider not well of Things, to suppose that this happened by the Power of the Conqueror, in Conforming the Laws of this Kingdom to those of *Normandy*; and therefore will needs have it, that our *English* Laws still retain the Mark of that Conquest, and that we received our Laws from him as from a Conqueror; than which Assertion, (as it appears even by what has before been said) nothing can be more untrue. Besides, if there were any Laws derived from the *Normans* to us, as perhaps there might be some, yea, possibly many; yet it no more concludes the Position to be true, that we received such Laws *per Modum Conquestûs*, than if the Kingdom of *England* should at this Day take some of the Laws of *Persia*, *Spain*, *Egypt*, or *Assyria*, and by Authority of Parliament settle them here. Which tho' they were for their Matter Foreign, yet their obligatory Power, and their formal Nature

Our Laws not derived from the *Normans*.

or Reason of becoming Laws here, were not at all due to those Countries, whose Laws they were, but to the proper and intrinsical Authority of this Kingdom by which they were received as, or enacted into, Laws: And therefore, as no Law that is Foreign binds here in *England*, till it be received and authoritatively engrafted into the Law of *England*; so there is no Reason in common Prudence and Understanding for any Man to conclude, that no Rule or Method of Justice is to be admitted in a Kingdom tho' never so Useful or Beneficial, barely upon this account, That another People entertain'd it, and made it a Part of their Laws before us.

But as to the Matter it self I shall consider, and enquire of the following Particulars, *viz.*

1. How long the Kingdom of *England* and Dutchy of *Normandy* stood in Conjunction under one Governor.

2. What Evidence we have touching the Laws of *Normandy*, and of their Agreement with ours.

3. Wherein consists that Parity or Disparity of the *English* and *Norman* Laws.

4. What might be reasonably judged to be the Reason and Foundation of that Likeness, which is to be found between the Laws of both Countries.

First, Touching the Conjunction under one Governor of *England* and *Normandy*, we

are to know, That the Kingdom of *England* and Dutchy of *Normandy* were *de facto* in Conjunction under these Kings, *viz.. William* I. *William* II. *Henry* I. King *Stephen*, *Henry* II. and *Richard* I. who, dying without Issue, left behind him *Arthur* Earl of *Britain*, his Nephew, only Son of *Geoffry* Earl of *Britain*, second Brother of *Richard* I. and *John* the youngest Brother to *Richard* I. who afterward became King of *England* by usurping the Crown from his Nephew *Arthur*. But the Princes of *Normandy* still adhered to *Arthur*, *sicut Domino Ligeo suo dicentes Judicium & Consuetudinem esse illarum Regionum ut Arthurus Filius Fratris Seniorís in Patrimonio sibi debito & hæreditate Avunculo suo succedat eodem jure quod Gaulfridus Pater ejus esset habiturus si Regi Richardo defuncto supervixisset.*

Elder Brother dying in Life of the Father, his Son to inherit.

And therein they said true, and the Laws of *England* were the same, Witness the Succession of *Richard* II. to *Edward* III. also the Laws of *Germany*, and the ancient *Saxons* were accordant hereunto; and it was accordingly decided in a Trial by Battle, under *Otho* the Emperor, as we are told by *Radulphus*, *de Diceto sub Anno* 925. And such are the Laws of *France* to this Day, *Vide Chopinus de Domanio Franciæ*, *Lib.* 2. *Tit.* 12. And such were the ancient Customs of the *Normans*, as we are told by the *Grand Contumier*, *cap.* 99. And such is the Law of *Normandy*, and of the Isles of *Jersey* and *Guernsey* (which some time were Parcel thereof) at this Day, as is agreed by *Terrier*, the best Expositor of their Customs, *Lib.* 2.

cap. 2. And so it was adjudg'd within my Remembrance in the Isle of *Jersey*, in a Controversie there, between *John Perchard* and *John Rowland*, for the Goods and Estate of *Peter Perchard*.

But nevertheless, *John* the Uncle of *Arthur* came by Force and Power, *Et Rotomagum Gladio Ducatûs Normanniæ accinctus est per Ministerium Rotomagensis Archiepiscopi*, as *Mat. Paris* says; and shortly after also usurped the Crown of *England*, and imprisoned his Nephew *Arthur*, who died in the Year 1202. being as was supposed Murthered by his said Uncle, *Vide Mat. Paris in fine Regni Regis Rici' Primi*, and *Walsingham* in his *Ypodigma Neustriæ sub eodem Anno* 1202.

And to countenance his Usurpation in *Normandy*, and to give himself the better Pretence of Title, he by his Power so far prevailed there, that he obtained a change of the Law there, purely to serve his Turn, by transferring the Right of Inheritance from the Son of the elder Brother to the younger Brother, as appears by the *Grand Contumier*, *cap.* 99. But withal, the *Glos* takes notice of it as an Innovation, and brought in by Men of Power, tho' it mentions not the particular Reason, which was as aforesaid.

The King of *France* (of whom the Dutchy of *Normandy* was holden) highly resented the Injury done by King *John* to his Nephew *Arthur*, who as was strongly suspected came not fairly to his End. He summoned King *John* as Duke of *Normandy* into *France*, to give an Account of his Actions, and upon his

his Default of appearing, he was by King *Philip* of *France* forejudged of the said Duchy, *Vide Mat. Paris, in initio Regni Johannis*; and this Sentence was so effectually put in Execution, that in the Year 1204. *Mat. Paris* tells us, *Tota Normannia, Turania Andegavia, & Pictavia cum Civitatibus & Castellis & Rebus aliis præter Rupellam, Toar, & Mar Castellam sunt in Regis Francorum Dominium devoluta.*

But yet he retained, tho' with much Difficulty, the Islands of *Jersey* and *Guernsey*, and the uninterrupted Possession of some Parts of *Normandy* for some time after, and both he and his Son King *Hen.* III. kept the Stile and Title of Dukes of *Normandy*, &c. till the 43d Year of King *Hen.* III. at which time for 3000 *Livres Tournois*, and upon some other Agreements, he resigned *Normandy* and *Anjou* to the King of *France*, and never afterwards used that Title, as appears by the Continuation of *Mat. Paris*, *sub Anno* 1260. only the four Islands, some time Parcel of *Normandy*, were still, and to this Day, are enjoyed by the Crown of *England*, viz. *Jersey*, *Guernsey*, *Sarke*, and *Aldernay*, tho' they are still governed under their ancient *Norman* Laws.

Normandy resigned by King *John.*

Secondly, As to the Second Inquiry, What Evidence we have touching the Laws of *Normandy*: The best, and indeed only common Evidence of the ancient Customs and Laws of *Normandy*, is that Book which is called, *The Grand Contumier of* Normandy, which in later Years has been illustrated,

2.

The *Contumier of Normandy.*

not only with a *Latin* and *French* Gloss, but also with the Commentaries of *Terrier*, a *French* Author.

This Book does not only contain many of the ancienter Laws of *Normandy*, but most plainly it contains those Laws and Customs which were in Use here in the Time of King *Hen.* II. King *Rich.* I. and King *John*, yea, and such also as were in Use and Practice in that Country after the Separation of *Normandy* from the Crown of *England*; for we shall find therein, in their Writs and Processes, frequent Mention of King *Rich.* I. and the entire Text of the 110th Chapter thereof is an Edict of *Philip* King of *France*, after the Severance of *Normandy* from the Crown of *England*. (I speak not of those additional Edicts which are annex'd to that Book of a far later Date.) So that we are not to take that Book as a Collection of the Laws of *Normandy*, as they stood before the Accession or Union thereof to the Crown of *England*; but as they stood long after, under the Time of those Dukes of *Normandy* that succeeded *William* I. and it seems to be a Collection made after the Time of K. *Hen.* III. or at least after the Time of K. *John*, and consequently it states their Laws and Customs as they stood in Use and Practice about the Time of that Collection made, which Observation will be of Use in the ensuing Discourse.

3. *Thirdly*, Touching the Third Particular, *viz.* The Agreement and Disparity of the Laws of *England* and *Normandy*. It is very true,

true, we ſhall find a great Suitableneſs in their Laws, in many Things agreeing with the Laws of *England*, eſpecially as they ſtood in the Time of King *Hen.* II. the beſt Indication whereof we have in the Collection of *Glanville*; the Rules of Deſcents, of Writs, of Proceſs, of Trials, and ſome other Particulars, holding a great Analogy in both Dominions, yet not without their Differences and Diſparities in many Particulars, *viz.*

Firſt, Some of thoſe Laws are ſuch as were never uſed in *England*; for Inſtance, There was in *Normandy* a certain Tribute paid to the Duke, called *Monya*, *id eſt*, a certain Sum yielded to him (in Conſideration that he ſhould not alter their Coin) payable every three Years, *Vide Contumier*, *cap.* 15. But this Payment was never admitted in *England*; indeed it was taken for a Time, but was ouſted by the firſt Law of King *Hen.* I. as an Uſurpation. Again, by the Cuſtom of *Normandy*, the Lands deſcended to the Baſtard Eigne, born before Marriage of the ſame Woman, by whom the ſame Man had other Children after Marriage, *Contumier*, *cap.* 27. But the Laws of *England* were always contrary, as appears by *Glanville*, *Lib.* 7°. *cap.* 12. And the Statute of *Merton*, which ſays, *Nolumus Leges Anglicanas Mutare*, *&c.* Again, by the Laws of *Normandy*, if a Man died without Iſſue, or Brother, or Siſter, the Lands did deſcend to the Father, *Contumier*, *cap.* 15. *Terrier*, *cap.* 2. But in

Difference between the *Contumier* and the Laws of *England*.

England, this Law seems never to have been used, *Sed Quære*, *Glanville*, *Lib.* 7. *cap.* 1.

2*dly*, Again, Some Laws were used in *Normandy*, which were in Use in *England* long before the supposed *Norman* Conquest, and therefore could in no Possibility have their original Force, or any binding Power here upon that Pretence: For Instance, it appears by the *Custumier* of *Normandy*, that the Sheriff of the County was an *Annual* Officer, and so 'tis evident he was likewise in *England* before the Conquest: And among the Laws of *Edward* the *Confessor*, it is provided, *Quod Aldermanni in Civitatibus eandem habeant Dignitatem qualem habent Ballivi hundrederum in Ballivis suis sub Vicecomitem*: Again, Wreck of the Sea, and Treasure *Trove* was a Prerogative belonging to the Dukes of *Normandy*, as appears by the *Contumier*, *cap.* 17, & 18. and so it was belonging to the Crown of *England* before the Conquest, as appears by the Charter of *Edward* the *Confessor* to the Abby of *Ramsey* of the Manor of *Ringstede*, *cum toto ejectu Maris quod* Wreccum *dicitur*, and the like, *vide ibid.* of Treasure *Trove*, & *vide* the Laws of *Edward* the *Confessor*, *cap.* 14. So Fealty, Homage, and Relief, were incident to Tenures by the Laws of *Normandy*, *Vide Contumier*, *cap.* 29. And so they were in *England* before the Conquest, as appears by the Laws of *Edward* the *Confessor*, *cap.* 35. and the Laws of *Canutus*, mentioned by *Brompton*, *cap.* 8. So the Trial by Jury of Twelve Men was the usual Trial among the *Normans* in most

most Suits, especially in Assizes, & *Juris Utrums*, as appears by the *Contumier*, *cap.* 92, 93, & 94. and that Trial was in Use here in *England* before the Conquest, as appears in *Brompton* among the Laws of King *Etheldred*, *cap.* 3. which gives some Specimen of it, *viz. Habeant placita in singulis* Wapentachiis *& exeant* Seniores duodecim Thani *vel Præpositus cum iis & jurent quod neminem innocentem accusare nec Noxium concelare.*

3*dly*, Again, In some Things, tho' both the Law of *Normandy* and the Law of *England* agreed in the Fact, and in the manner of Proceeding; yet there was an apparent Discrimination in their Law from ours: As for Instance, The Husband seized in Right of the Wife, having Issue by her, and she dying, by the Custom of *Normandy* he held but only during his Widowhood, *Contumier*, *cap.* 119. But in *England*, he held during his Life by the Curtesy of *England*.

4*thly*. But in some Things, the Laws of *Normandy* agreed with the Laws of *England*, especially as they stood in the Times of *Hen.* II. and *Richard* I. so that they seem to be as it were Copies or Counterparts one of another; tho' in many Things, the Laws of *England* are since changed in a great Measure from what they then were: For Instance, at this Day in *England*, and for very many Ages past, all Lands of Inheritance, as well *Socage Tenures*, as of Knights Service, descend to the eldest Son, unless in *Kent* and some other Places where the

Custom directs the Descent to all the Males, and in some Places to the youngest; but the ancient Law used in *England*, though it directed Knights Services and Serjeanties to descend to the eldest Son, yet it directed Vassalagies and Socage Lands to descend to all the Sons, *Glanvil, Lib. 7. cap. 3.* and so does the Laws of *Normandy* to this Day. *Vide Contumier, cap. 26. & post hic, cap. 11.*

Again, *Leprosy* at this Day does not impede the Descent; but by the Laws in Use in *England*, in the elder Times, unto the Time of King *John*, and for some Time afterwards, *Leprosy* did impede the Descent, as *Placito quarto Johannis*, in the Case of *W. Fulch*, a Judge of that Time; and accordingly were the Laws of *Normandy*, *Vide Le Contumier, cap. 27.*

Old Law of Trials by Jury.

Again, At this Day, by the Law of *England*, in Cases of Trials by Twelve Men, all ought to agree, and any one dissenting, no Verdict can be given; but by the Laws of *Normandy*, though a Verdict ought to be by the concurring Consent of Twelve Men, yet in case of Dissent or Disagreement of the Jury, they used to put off the lesser Number that were Dissenters, and added a kind of *Tales* equal to the greater Number so agreeing, until they had got a Verdict of Twelve Men that concurred, *Contumier, c. 95.* And we may find some ancient Footsteps of the like Use here in *England*, though long since antiquated, *Vide Bracton, Lib. 4. cap. 19.* where he speaks thus, *Contingit etiam multotiens quod Juratores in veritate dicenda sunt*

sibi contrarii ita quod in unam concordare non possunt sententiam, Quo casu de Consilio Curiæ assortietur Assisa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex & adjungantur aliis, vel etiam per seipsos sine aliis, de veritate discutiant & judicent, & per se respondeant & eorum veredictum allocabitur & tenebitur cum quibus ipsi convenirent.

Again, at this Day, by the Laws of *England*, a Man may give his Lands in Fee-simple, which he has by Descent, to any one of his Children, and disinherit the rest: But by the ancient Laws used here, it seems to be otherwise; as *Mich.* 10 *Johannis Glanv. Lib.* 7. *cap.* 2. the Case of *William de Causeia*. And accordingly were the Laws of *Normandy*, as we find in the *Grand Contumier*, *cap.* 36. *Quand le Pere avoit pluseurs fills, ils ne peut faire de son Heritage le un Meilleur que le auter*; and yet it seems to this Day, in *England*, it holds some Resemblance in Cases of Frank-Marriage, *viz.* That the *Doness*, in case she will have any Part of her Father's other Lands, ought to put her Lands in *Hochpot*. And of Descents.

Again, By the Law of *England*, the younger Brother shall not exclude the Son of the elder, who died in the Life-time of the Father: And this was the ancient Law of *Normandy*, but received some Interruption in Favour of King *John*'s Claim, *Vide Contumier*, *cap.* 25. *& hic ante*; and indeed, generally the Rule of Descents in *Normandy* was the same in most Cases with that of Discents

Discents with us at this Day; as for Instance, That the Descent of the Line of the Father shall not resort to that of the Mother, *Et e converso*; and that the Course was otherwise in Cases of Purchases. But in most Things the Law of *Normandy* was consonant to the Law with us, as it was in the Time of King *Richard* I. and King *John*; except in Cases of Descents to *Bastard eigne*, excluding *Mulier puisne*, as aforesaid.

Their Writs.

Again, at this Day there are many Writs now in Use which were anciently also in Use here, as well as in *Normandy*: As Writs of Right, Writs of Dower, Writs *De novel Disseisin, de Mortdancestor, Juris utrum, Darrein presentment, &c.* And some that are now out of Use, though anciently in Use here in *England*; as Writs *De Feodo vel vado, De Feodo vel Warda, &c.* All which are taken Notice of by *Glanvil, Lib.* 13. *cap.* 28, 29. And the very same Forms of Writs in Effect were in Use in *Normandy*, as appears by the *Contumier per Totum*, and the Writ *De Feodo vel Vado, (ibid. cap.* 11.) according to *Glanville, Lib.* 13. *cap.* 27. runs thus, *viz. Rex Vicecomiti salutem: Summone per bonos summonitores duodecim liberos & legales homines de vicineto quod sint coram me vel Justiciis meis eo die parati Sacramento Recognoscere utrum N. teneat unam Carucatam Terræ in illa villa quæ R. clamat versus eum per Breve meum in Feodo an in vadio, invadiatam ei ab ipso R. vel ab H. anteccessore ejus, (vel aliter) si sit Feodam vel hæreditas ipsius N. an in vadio invadiata ei ab ipso R. vel*

R. vel ab H. &c. Et interim Terram illam videant, &c. Vide ibid.

And according to the *Grand Contumier*, that Writ runs thus, *viz. Si Rex fecerit te ſecurum de clamore ſuo proſequend' ſummoneas Recognitores de Viceneto quod ſint ad primas Aſſiſas Balliva, ad cognoſcendum utrum Carucata Terræ in* B. *quod* G. *deforceat* R. *ſit Feodum tenentis vel vadium novum dictum per Manus* G. *poſt Coronationem Regis* Richardi *& pro quanta, & utrum ſit propinquior Hæres ad redimendum vadium, & videatur interim Terræ, &c.* So that there ſeems little Variance, either in the Nature or in the Form of thoſe Writs uſed here, in the Time of *Henry* II. And thoſe uſed in *Normandy* when the Contumier was made.

Times of Limitation.

Again, The Uſe was in *England* to limit certain notable Times, within the Compaſs of which thoſe Titles which Men deſign'd to be relieved upon, muſt accrue: Thus it was done in the Time of *Henry* III. by the Statute of *Merton*, *cap.* 8. at which Time the Limitation in a Writ of Right was from the Time of King *Henry* I. and by that Statute it is reduced to the Time of King *Henry* II. and for Aſſizes of *Mortdanceſtor* they were thereby reduced from the laſt Return of King *John* out of *Ireland*, which was 12 *Johannis*, and for Aſſizes of *Novel Diſſeiſin*, *a prima Transfretatione Regis in Normanniam*, which was 5 *Hen.* 3. and which before that had been *poſt ultimum redditum* Henricus *III. de* Britannia, as appears by *Bracton*. And this Time of Limitation was alſo

also afterwards, by the Statute of *West.* 1. *cap.* 39. and *West.* 2. *cap.* 2. 46. reduced unto a narrower Scantlet, the Writ of Right being limitted to the First Coronation of King *Richard* I.

But before the Limitation set by that Statute of *Merton*, there were several Limitations set for several Writs; for we find among the Pleas of King *John*'s Time, the Limitation of Writs, *De Tempore quo Rex* Henricus *avus noster fuit vivus & Mortuus*; and in a Writ of Aile, *Die quo Rex* Henricus *obiit* in the Time of *Henry* II. as appears by *Glanville, Lib.* 13. *cap.* 3. there were then divers Limitations in Use, as in *Mortdancestors, post prima Coronationem nostram, viz. Henrici secundi, Glanvil. Lib.* 1. *cap.* 1. and touching Assizes of *Novel Disseisin, Vide ibid. cap.* 32. where he tells us, *Cum quis intra Assisam, &c.* And the Time of Limitation in an Assize, was then *post ultimam meam Transfretationem*, (*viz.* Henrici *primi*) *in Normanniam, Lib.* 13. *cap.* 33. But in a Writ of Right, as also in a Writ of Customs and Services, it was *de tempore Regis* Henrici *avi mei, viz. Hen.* 1. *vid. ib. Lib.* 12. *cap.* 10, 16. And it seems very apparent, that the Limitations anciently in *Normandy*, for all Actions Ancestrel was *post primam Coronationem Regis* Henrici *secundi*, as appears expressly in the *Contumier, cap.* 111. *De Feofe & Gage.*

So that aneicntly the Time of Limitation in *Normandy* was the same as in *England*, and indeed borrowed from *England*, *viz.* In all Actions Ancestrel from the Coronation of

of *Henry* II. And thus in those Actions wherein the Limitation was anciently from the Coronation of King *Richard* I. was substituted as in the Writ *De Feofe & Gage*, in the *Contumier*, *cap.* 111. *De Feofe & Forme*, *cap.* 112. In the Writ *De Ley Apparisan*, *ib. cap.* 24. *& cap.* 22. *Ascun Gage ne peut estre requise en* Normandy, *si il ne fuit engage post le Coronement de Roy* Richard *ou deins quarante annus*: So that the old Limitation, as well for the Redemption of Mortgages, as for bringing those Writs above-mentioned, was *post Coronationem Regis* Henrici *Secundi*; but altered, as it seems, by King *Philip*, the Son of *Lewis* King of *France*, after King *John*'s Ejectment out of *Normandy*, and since the Time from the Coronation of King *Richard* I. is estimated to bear Proportion to 40 Years. It is probable this Change of the Limitation by King *Philip* of *France*, was about the beginning of the Reign of King *Henry* III. or about 30 or 40 Years after the Coronation of *Richard* I. from whose Coronation about 30 Years were elapsed, 5 *aut* 6 Henrici 3. for anciently the Limitation in this Case was 30 Years.

Fourthly, I now come to the Fourth Inquiry, *viz.* How this great Parity between the Laws of *England* and *Normandy* came to be effected; and before I come to it, I shall premise Two Observables, which I would have the Reader to carry along with him through the whole Discourse, *viz.* *First*, That this Parity of Laws does not at all infer a Necessity, that they should be imposed

impoſed by the *Conqueror*, which is ſufficiently ſhewn in the foregoing Chapters; and in this it will appear, that there were divers other Means that cauſed a Similitude of both Laws, without any Suppoſition of impoſing them by the *Conqueror*. *Secondly*, That the Laws of *Normandy* were in the greater Part thereof borrowed from ours, rather than ours from them, and the Similitude of the Laws of both Countries did in greater Meaſure ariſe from their Imitation of our Laws, rather than from our Imitation of theirs, though there can't be denied a Reciprocal Imitation of each others Laws was, in ſome Meaſure at leaſt, had in both Dominions: And theſe Two Things being premiſed, I deſcend to the *Means* whereby this Parity or Similitude of the Laws of both Countries did ariſe, as follow, *viz.*

Cauſes of a congruity of Laws.

Firſt, Mr. *Camden* and ſome others have thought, there was ever ſome Congruity between the ancient Cuſtoms of this Iſland and thoſe of the Country of *France*, both in Matters Religious and Civil; and tells us of the ancient *Druids*, who were the common Inſtructors of both Countries. *Gallia Cauſidicos docuit facunda* Britannos: And ſome have thought, that anciently both Countries were conjoined by a ſmall Neck of Land, which might make an eaſier Tranſition of the Cuſtoms of either Country to the other; but thoſe Things are too remote Conjectures, and we need them not

to ſolve the Congruity of Laws between *England* and *Normandy*. Therefore,

Secondly, It ſeems plain, that before the *Normans* coming in Way of Hoſtility, there was a great Intercourſe of Commerce and Trade, and a mutual Communication, between thoſe Two Countries; and the Conſanguinty between the Two Princes gave Opportunities of ſeveral Interviews between them and their Courts in each others Countries: And it is evident by Hiſtory, that the *Confeſſor*, before his Acceſſion to the Crown, made a long Stay in *Normandy*, and was there often, which of Conſequence muſt draw many of the *Engliſh* thither, and of the *Normans* hither; all which might be a Means of their mutual Underſtanding of the Cuſtoms and Laws of each others Country, and gave Opportunities of incorporating and engrafting divers of them into each other, as they were found uſeful or convenient; and therefore the Author of the Prologue to the *Grand Cuſtumier* thinks it more probable, That the Laws of *Normandy* were derived from *England*, than that ours were derived from thence. Commerce, &c. between the *Engliſh* and *Normans*.

Thirdly, 'Tis evident, that when the Duke of *Normandy* came in, he brought over a great Multitude, not only of ordinary Soldiers, but of the beſt of the Nobility and Gentry of *Normandy*; hither they brought their Families, Language and Cuſtoms, and the Victor uſed all Art and Induſtry to incorporate them into this Kingdom: And the more effectually to make both People become

become one Nation, he made Marriages between the *Engliſh* and *Normans*, tranſplantmaingny *Norman* Families hither, and many *Engliſh* Families thither; he kept his Court ſometimes here, and ſometimes there; and by thoſe Means inſenſibly derived many *Norman* Cuſtoms hither, and *Engliſh* Cuſtoms thither, without any ſevere Impoſition of Laws on the *Engliſh* as Conqueror: And by this Method he might eaſily prevail to bring in, even without the People's Conſent, ſome Cuſtoms and Laws that perhaps were of Foreign Growth; which might the more eaſily be done, conſidering how in a ſhort Time the People of both Nations were intermingled; they were mingled in Marriages, in Families, in the Church, in the State, in the Court, and in Councils; yea, and in Parliaments in both Dominions, though *Normandy* became, as it were, an Appendix to *England*, which was the nobler Dominion, and received a greater Conformity of their Laws to the *Engliſh*, than they gave to it.

Fourthly, But the greateſt Means of the Aſſimilation of the Laws of both Kingdoms was this: The Kings of *England* continued Dukes of *Normandy* till King *John*'s Time, and he kept ſome Footing there notwithſtanding the Confiſcation thereof by the King of *France*, as aforeſaid; and during all this Time, *England*, which was an abſolute Monarchy, had the Prelation or Preference before *Normandy*, which was but a Feudal Dutchy, and a ſmall Thing in reſpect of

3 *England*;

England; and by this Means *Normandy* became, as it were, an Appendant to *England*, and ſucceſſively received its Laws and Government from *England*; which had a greater Influence on *Normandy* than that could have on *England*; inſomuch, that oftentimes there iſſued Precepts into *Normandy* to ſummon Perſons there to anſwer in Civil Cauſes here; yea, even for Lands and Poſſeſſions in *Normandy*; as *Placito* 1 *Johannis*, a Precept iſſued to the Seneſchal of *Normandy*, to ſummon *Robert Jeronymus*, to anſwer to *John Marſhal*, in a Plea of Land, giving him 40 Days Warning; to which the Tenant appeared, and pleaded a Recovery in *Normandy*: And the like Precept iſſued for *William de Boſco*, againſt *Jeoffry Ruſham*, for Lands in *Corbeſpine* in *Normandy*.

And on the other Side, *Trin.* 14 *Johannis*, in a Suit between *Francis Borne* and *Thomas Adorne*, for certain Lands in *Ford*. The Defendant pleaded a Concord made in *Normandy* in the Time of King *Richard* I. upon a Suit there before the King, for the Honour of *Bonn* in *Normandy*, and for certain Lands in *England*; whereof the Lands in Queſtion were Parcel before the Seneſchal of *Normandy*, *Anno* 1099. But it was excepted againſt, as an inſufficient Fine, and varying in Form from other Fines; and therefore the Defendant relied upon it as a Releaſe.

By theſe, and many the like Inſtances, it appears as follows, *viz.*

First, That there was a great Intercourse between *England* and *Normandy* before and after the Conqueror, which might give a great Opportunity of an Assimilation and Conformity of the Laws in both Countries. *Secondly*, That a much greater Conformation of Laws arose after the Conqueror, during the Time that *Normandy* was enjoyed by the Crown of *England*, than before. And *Thirdly*, That this Similitude of the Laws of *England* and *Normandy* was not by Conformation of the Laws of *England* to those of *Normandy*, but by Conformation of the Laws of *Normandy* to those of *England*, which now grew to a great Height, Perfection and Glory; so that *Normandy* became but a Perquisite or Appendant of it.

And as the Reason of the Thing speaks it, so the very Fact it self attests it. For,

First, It is apparent, That in Point of Limitation in Actions Ancestrel, from the Time of the Coronation of King *Henry* II. it was anciently so here in *England* in *Glanvil*'s Time, and was transmitted from hence into *Normandy*; for it is no way reasonable to suppose the Contrary, since *Glanville* mentions it to be enacted here, *Concilio procerum*; and though this be but a single Point, or Instance, yet the Evidence thereof makes out a Criterion, or probable Indication, that many other Laws were in like Manner so sent hence into *Normandy*.

Secondly,

Secondly, It appears, That in the Succeſſion of the Kings of *England*, from King *William* I. to King *Henry* II. the Laws of *England* received a great Improvement and Perfection, as will plainly appear from *Glanvil*'s Book, written in the Time of King *Henry* II. eſpecially if compared with thoſe Sums or Collections of Laws, either of *Edward* the Confeſſor, *William* I. or *Henry* I. whereof hereafter.

So that it ſeems, by Uſe, Practice, Commerce, Study and Improvement of the *Engliſh* People, they arrived in *Henry* II.'s Time to a greater Improvement of the Laws; and that in the Time of King *Richard* I. and King *John*, they were more perfected, as may be ſeen in the Pleadings, eſpecially of King *John*'s Time; and tho' far inferior to thoſe of the Times of Succeeding Kings, yet they are far more regular and perfect than thoſe that went before them. And now if any do but compare the *Coutumier* of *Normandy*, with the Tract of *Glanville*, he will plainly find that the *Norman* Tract of Laws followed the Pattern of *Glanvil*, and was writ long after it, when poſſibly the *Engliſh* Laws were yet more refined and more perfect; for it is plain beyond Contradiction, that the Collection of the Cuſtoms and Laws of *Normandy* was made after the Time of King *Henry* II. for it mentions his Coronation, and appoints it for the Limitation of Actions Anceſtrel, which muſt at leaſt be 30 Years after; nay, the *Coutumier* appears to have been

made after the Act of Settlement of *Normandy* in the Crown of *France*; for therein is specified the Institution of *Philip* King of *France*, for appointing the Coronation of King *Richard* I. for the Limitation of Actions; which was after the said *Philip*'s full Possession of *Normandy*.

Indeed, if those Laws and Customs of *Normandy* had been a Collection of the Laws they had had there before the coming in of King *William* I. it might have been a Probability that their Laws, being so near like ours, might have been transplanted from thence hither; but the Case is visibly otherwise, for the *Coutumier* is a Collection after the Time of King *Richard* I. yea, after the Time of King *John*, and possibly after *Henry* III.'s Time, when it had received several Repairings, Amendments and Polishings, under the several Kings of *England*, *William* I. *William* II. *Henry* I. King *Steven*, *Henry* II. *Richard* I. and King *John*; who were either knowing themselves in the Laws of *England*, or were assisted with a Council that were knowing therein.

And as in this Tract of Time the Laws of *England* received a great Advance and Perfection, as appears by that excellent Collection of *Glanville*, written even in *Henry* II.'s Time, when yet there were near 30 Years to acquire unto a further Improvement before *Normandy* was lost; so from the Laws of *England* thus modelled, polished and perfected, the same Draughts were drawn upon the Laws of *Nor-*

Normandy, which received the faireſt Lines from the Laws of *England*, as they ſtood at leaſt in the beginning of King *John*'s Time, and were in Effect in a great Meaſure the Defloration of the *Engliſh* Laws, and a Tranſcript of them, though mingled and interlarded with many particular Laws and Cuſtoms of their own, which altered the Features of the Original in many Points.

CHAP. VII.

Concerning the Progress of the Laws of England *after the Time of King* William *I. until the Time of King* Edward *II.*

THAT which precedes in the Two foregoing Chapters, gives us some Account of the Laws of *England*, as they stood in and after the great Change which happened under King *William* I. commonly called, *The Conqueror*. I shall now proceed to the History thereof in the ensuing Times, until the Reign of King *Edward* II.

K. W. 2. *William* I. having Three Sons; *Robert* the eldest, *William* the next, and *Henry* the youngest, disposed of the Crown of *England* to *William* his second Son, and the Dutchy of *Normandy* to *Robert* his eldest Son; and accordingly *William* II. commonly called, *William Rufus*, succeeded his Father in this Kingdom. We have little memorable of him in relation to the Laws, only that he severely press'd and extended the *Forest Laws*.

K. H. 1. *Henry* I. Son of *William* I. and Brother of *William* II. succeeded his said Brother in the Kingdom of *England*, and afterwards expelled his eldest Brother *Robert* out of the Dutchy of *Normandy* also. He proceeded

ceeded much in the Benefit of the Laws, *viz.*

First, He reſtored the Free-Election of Biſhops and Abbots, which before that Time he and his Predeceſſors inveſted, *per Annulum & Bacculum*; yet reſerving thoſe Three Enſigns of the Patronage thereof, *viz. Congé d'Eſlire*, Cuſtody of the Temporalties, and Homage upon their Reſtitution. *Vide Hoveden, in Vita ſua.* Reſtored and repair'd the Laws.

But *Secondly*, The great Eſſay he made, was the compoſing an Abſtract or Manual of Laws, wherein he confirm'd the Laws of *Edward* the Confeſſor, *Cum illis Emendationibus quibus eam Pater meus emendavit Baronum ſuorum Concilio*; and then adds his own Laws, ſome whereof ſeem to taſte of the Canon Law. The whole Collection is tranſcribed in the Red Book of the *Exchequer*; from whence it is now printed in the End of *Lambard*'s *Saxon* Laws, and therefore not needful to be here repeated.

They, for the moſt Part, contain a Model of Proceedings in the County Courts, the Hundred Courts, and the Courts Leet; the former to be held Twelve Times in the Year, the latter twice; and alſo of the Courts Baron. Theſe were the ordinary uſual Courts, wherein Juſtice was then, and for a long Time after, moſt commonly adminiſtred; alſo they concern Criminal Proceedings, and the Puniſhment of Crimes, and ſome few Things touching Civil Actions and Intereſts, as in Chapter 70, directing Deſcents, *viz.* Of Deſcents.

Si quis sine Liberis decesserit Pater aut Mater ejus in Hereditatem succedant, vel Frater vel Soror, si Pater & Mater desint; si nec hos habeat, Frater vel Soror Patris vel Matris, & deinceps in quintum Genetalium, qui cum propiores in parentela sint hereditario Jure succedant; Et dum virilis sexus extiterit & hæreditas ab inde sit Femina non hæreditetur; primum Patris Feodum primogenitus Filius habeat, Emptiones vero & deinceps Acquisitiones det cui magis velit, sed si Bookland *habeat quam ei Parentes dederint, non Mittat eam extra cognationem suam.*

I have observ'd and inserted this Law, for Two Reasons, *viz. First*, To justify what I before said, That the Laws of *Normandy* took the *English* Laws for their Pattern in many Things; *Vide le Coutumier, cap.* 25, 26, 36, *&c.* And *Secondly*, To see how much the Laws of *England* grew and increased in their Particularity and Application between this Time and the Laws of *William* I. which in Chapter 36, has no more touching Descents but this, *viz. Si quis intestatus obierit, liberi ejus hæreditatem equaliter dividant.* But Process of Time, grafted thereupon, and made particular Provisions for particular Cases, and added Distributions and Subdivisions to those General Rules.

These Laws of King *Henry* I. are a kind of Miscellany, made up of those ancient Laws, called, *The Laws of the Confessor*, and King *William* I. and of certain Parts of the Canon and Civil Law; and of other Provisions, that Custom and the Prudence of

of the King and Council had thought upon, choſen, and put together.

King *Stephen* ſucceeded, by Way of Uſurpation, upon *Maud* the Sole Daughter and Heir of King *Hen.* I. The Laws of *Hen.* I. grew tedious and ungrateful to the People, partly becauſe new, and ſo not ſo well known, and partly becauſe more difficult and ſevere than thoſe ancient Laws, called, *The Confeſſor's*; for *Walſingham*, in his *Ypodigma Neuſtriæ*, tells us, That the *Londoners* petitioned Queen *Maud*, *ut liceret eis uti Legibus ſancti Edvardi & non legibus Patris ſui Henrici, quia graves erant*; and that her Refuſal gave Occaſion to their Defection from her, and ſtrenthened *Stephen* in his Uſurpation; who, according to the Method of Uſurpers, to ſecure himſelf in the Throne, was willing and ready to gratifie the Deſires of the People herein; and furthermore, took his Oath, 1*ſt*, That he would not retain in his Hands the Temporalties of the Biſhops; 2*dly*, That he would remit the Severity of the *Foreſt* Laws; and 3*dly*, That he would alſo remit the Tribute of *Danegelt*: But he performed nothing. King *Stephen.*

His Times were troubleſome, he did little in relation to the Laws; nor have we any Memorial of any Record touching his Proceedings therein, only there are ſome few *Pipe Rolls* of his Time, relating to the Revenue of the Crown.

Henry II. the Son of *Maud*, ſucceeded *Stephen*, he Reigned long, *viz.* about Thirty Five Years; and tho' he was not without great K. H. II.

great Troubles and Difficulties, yet he built up the Laws and the Dignity of the Kingdom to a great Height and Perfection. For,

Settles Peace, and reforms the Coin.

First, In the Entrance of his Government he settled the Peace of the Kingdom; he also reformed the Coin, which was much adulterated and debased in the Times and Troubles of King *Stephen*, *Et Leges Henrici avi sui præcepit per totum Regnum inviolabiliter observari.* Hoveden.

Constitutions of *Clarendon's.*

Secondly, Against the Insolencies and Usurpations of the Clergy; he by the Advice of his Council or Parliament at *Clarendon*, enacted those Sixteen Articles mentioned by *Mat. Paris*, *sub Anno* 1164. They are long, and therefore I remit you thither for the Particulars of them.

'Tis true, *Thomas Becket*, Archbishop of *Canterbury*, boldly and insolently took upon him to declare many of those Articles void, especially those Five mentioned in his Epistle to his Suffragans, recorded by *Hoveden*, *viz.* 1*st*, That there should be no Appeal to the Bishop without the King's *Licence.* 2*dly*, That no Archbishop or Bishop should go over the Seas at the *Pope's* Command without the King's *Licence.* 3*dly*, That the Bishop should not excommunicate the King's Tenants *in Capite* without the King's *Licence.* 4*thly*, That the Bishop should not have the Conuzance of Perjury, or *Fidei Læsionis.* And, 5*thly*, That the Clergy should be convened before Lay Judges, and that the King's Courts

Courts should have Conuzance of Churches and of Tythes.

Thirdly, He raised up the Municipal Laws of the Kingdom to a greater Perfection, and a more orderly and regular Administration than before; 'tis true, we have no Record of judicial Proceedings so ancient as that Time, except the Pipe Rolls in the *Exchequer*, which are only Accounts of his Revenue: But we need no other Evidence hereof than the Tractate of *Glanville*, which tho' perhaps it was not written by that *Ranulphus de Glanvilla*, who was *Justitiarius Angliæ* under *Hen.* II. yet it seems to be wholly written at that Time, and by that Book, tho' many Parts thereof are at this Day antiquated and altered, and in that long Course of Time, which has elapsed since that King's Reign, much enlarged, reformed, and amended, yet by comparing it with those Laws of the *Confessor* and Conqeror, yea, and the Laws of his Grandfather King *Hen.* I. which he confirmed; it will easily appear, that the Rule and Order, as well as the Administration of the Law, was greatly improved beyond what it was formerly, and we have more Footsteps of their Agreement and Concord herein with the Laws, as they were used from the Time of *Edw.* I. and downwards, than can be found in all those obsolete Laws of *Hen.* I. which indeed were but disorderly, confused and general Things, rather the Cases and Shells of directing the way of Administration Improv'd the Laws.

tion than Institutions of Law, if compared with *Glanville*'s Tractate of our Laws.

Fourthly, The Administration of the Common Justice of the Kingdom, seems to be wholly dispensed in the County Courts, Hundred Courts, and Courts Baron, except some of the greater Crimes reformed by the Laws of King *Hen.* I. and that Part thereof which was sometimes taken up by the *Justitiarius Angliæ*: This doubtless bred great Inconvenience, Uncertainty, and Variety in the Laws, *viz.*

Inconveniencies in the Laws.

First, By the Ignorance of the Judges, which were the Freeholders of the County: For altho' the Alderman or Chief Constable of every Hundred was always to be a Man learned in the Laws; and altho' not only the Freeholders, but the Bishops, Barons, and great Men, were by the Laws of King *Hen.* I. appointed to attend the County Court; yet they seldom attended there, or if they did, in Process of Time they neglected the Study of the *English* Laws, as great Men usually do.

Secondly, Another Inconvenience was, That this also bred great Variety of Laws, especially in the several Counties: For the Decision or Judgments being made by divers Courts, and several Independent Judges and Judicatories, who had no common Interest among them in their several Judicatories, thereby in Process of Time every several County would have several Laws, Customs, Rules, and Forms of Proceeding, which is always the Effect of several Independent

dependent Judicatories administred by ſeveral Judges.

Thirdly, A Third Inconvenience was, That all the Buſineſs of any Moment was carried by Parties and Factions: For the Freeholders being generally the Judges, and Converſing one among another, and being as it were the Chief Judges, not only of the Fact, but of the Law; every Man that had a Suit there, ſped according as he could make Parties, and Men of great Power and Intereſt in the County did eaſily overbear others in their own Cauſes, or in ſuch wherein they were intereſted, either by Relation of Kindred, Tenure, Service, Dependance, or Application.

Remedied; By Ordaining

And altho' in Caſes of falſe Judgment, the Law, even as then uſed, provided a Remedy by Writ of falſe Judgment before the King or his Chief Juſtice; and in caſe the Judgment was found to be ſuch in the County Court, all the Suitors were conſiderably amerced, (which alſo continued long after in Uſe with ſome Severity) yet this proved but an ineffectual Remedy for thoſe Miſchiefs.

Juſtices *Itinerant*.

Therefore the King took another and a more effectual Courſe; for in the 22d Year of his Reign, by Advice of his Parliament held at *Northampton*, he inſtituted Juſtices *itinerant*, dividing the Kingdom into Six Circuits, and to every Circuit allotting Three Judges, Knowing or Experienced in the Laws of the Realm: Theſe Juſtices with

with their several Circuits are declared by *Hoveden, sub eodem Anno, i. e.* 22 *H.* 2. viz.

1. *Hugo Cressy, Walterus filius Roberti, & Robertus Maunsel,* for *Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex,* and *Hartford* Counties.

2. *Hugo de Gundevilla, W. filius Radulphi, & W. Basset,* for *Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton,* and *Leicester* Counties.

3. *Robertus filius Bernardi, Richardus Giffard, & Rogerus filius Ramfrey,* for *Kent, Surrey, Sussex, Hampshire, Berks,* and *Oxon* Counties.

4. *W. filius Stephani, Bertein de Verdun, & Turstavi filius Simonis,* for *Hereford, Gloucester, Worcester,* and *Salop* Counties.

5. *Radulphus filius Stephani, W. Ruffus, & Gilbertus Pipard,* for the Counties of *Wilts, Dorset, Somerset, Devon,* and *Cornwall.*

6. *Robertus de Watts, Radulphus de Glanvilla, & Robertus Picknot,* for the Counties of *York, Richmond, Lancaster, Copland, Westmerland, Northumberland,* and *Cumberland.*

Hi, (Consilio Archiepiscoporum Episcoporum Comitum & Baronum Regni, &c. apud Nottingham existentium) missi sunt per singulos Angliæ Comitatus & juraverunt quod cuilibet jus suum conservarent illæsum. Hoveden fo. 313. *& Mat. Paris, in Anno* 1176. And that these Men were well known in the Law, appears by their Companion *Radulphus de Glanvilla,* who seems to be the Author of the Treatise *De Legibus*

Legibus Angliæ, and was afterwards made *Justitiarius Angliæ*.

To those Justices, was afterwards committed the Conuzance of all Civil and Criminal Pleas happening within their Divisions, and likewise Pleas of the Crown, Pleas touching Liberties, and the King's Rights; and the better to acquaint them with their Business, there were certain Assises which were first enacted at *Clarendon*, and afterwards confirmed at *Northampton*; they were not much unlike the *Capitula Itineris* mentioned in our old *Magna Charta*, but not so perfect, and are set down by *Hoveden*, *Ubi supra*, and are too long to be here inserted: I shall only take Notice of this one, *viz.* Establishing Descents, because I shall hereafter have Occasion to use it, *Si quis obierit Francus Tenens hæredes ipsius remaneant in talem Seisina qualem Pater suus, &c.*

* But besides those Courts in *Eyre*, there were two great standing Courts, *viz.* The *Exchequer*, and the Court of *Queen's-Bench*, *Vel Curiam coram ipso Rege, vel ejus Justiciario*; and it was provided by the above-mentioned *Assisæ*, *Quod Justiciæ faciant omnes Justicias & Rectitudines, Spectantes ad Dominium Regis, & ad Coronam suum, per breve Domini Regis vel illorum qui in ejus Loco erunt de Feodo dimidii Militis & infra, Nisi tam grandis sit querela quod non possit dedurci sine Domino Rege vel tali quam Justiciæ ei reponunt pro dubitatione sua, vel ad illos qui in Loco ejus erunt, &c.*

Neither do I find any distinct Mention of the Court of *Common-Bench* in the Time of this

* *Note*, Notwithstanding what our Author here writes, it appears by *Glanville* and others, That the *Common-Pleas* was then also in being, and *Magna Charta* has only fix'd that Court to a certain Place which before was moveable and uncertain.

this King, tho' in the Time of King *John* there is often Mention made thereof, and the Rolls of that Court of King *John*'s Time are yet extant upon Record, *& vide post. sub Richardi Primi.*

Limitation. The Limitation of the Assise of *Novel Disseisin*, is by those Assises appointed to be, *a tempore quo Dominus Rex venit in Angliam proximam post Pacis factam inter ipsum, & Regem filium suum.*

Justices. *Itinerant.* The same King afterwards, in the Twenty fifth Year of his Reign, divided the Limits of his *Itinerant Justices* into Four Circuits or Divisions, and to each Circuit assigned a greater Number of Justices, *viz.* Five at least, which are thus set down in *Hoveden*, *Folio* 337. *viz.*

Anno 1179. 25 H. 2. *Magno Concilio celebrato apud Windeshores, Communi Consilio Archiepiscoporum Comitum & Baronum & coram Rege Filio suo, Rex divisit Angliam in quatuor Partes, & unicuique partium praefecit viros sapientes ad faciendum Justitiam in Terra sua in hunc Modum.*

1. *Ricardus Episcopus Winton, Ricardus Thesaurarius Regis, Nicholaus filius Turoldi, Thomas Basset & Robertus de Whitefield*, for the Counties of *Southampton, Wilts, Glocester, Somerset, Devon, Cornwall, Berks* and *Oxon.*

2. *Galfridus Elienſis Episcopus, Nicholaus Capellanus Regis, Gilbertus Pipard, Reginald de Wisebeck Capellanus Regis & Gualfridus Hosce*, for the Counties of *Cambridge, Huntingdon,*

Northampton, Leiceſter, Warwick, Wincheſter, Hereford, Stafford and *Salop.*

3. *Johannes Epiſcopus Norwicenſis, Hugo Murdac Clericus Regis, Michael Bellet, Richardus de le Pec, & Radulphus Brito,* for *Norfolk, Suffolk, Eſſex, Hartford, Middleſex, Kent, Surrey, Suſſex, Bucks* and *Bedford.*

4. *Galfredus de Luci, Johannes Comyn, Hugo de Gaerſt, Radulphus de Glanvilla, W. de Bendings, Alanus de Furnellis,* for the Counties of *Nottingham, Derby, York, Northumberland, Weſtmerland, Cumberland,* and *Lancaſter.*

Iſti ſunt Juſticiæ in Curia Regis conſtituti ad audiendum clamores Populi.

This Prince did theſe Three notable Things, *viz.*

Firſt, By this Means, he improved and perfected the Laws of *England,* and doubtleſs transferred over many of the *Engliſh* Laws into *Normandy,* which, as before is obſerved, cauſed that great Suitableneſs between their Laws and ours; ſo that the Similitude did ariſe much more by a Conformation of their Laws to thoſe of *England,* than by any Conformation of the *Engliſh* Laws to theirs, eſpecially in the Reigns of King *Hen.* II. and his Two Sons, King *Richard,* and King *John,* both of whom were alſo Dukes of *Normandy.* He improv'd the Laws.

Secondly, He check'd the Pride and Inſolence of the *Pope* and the *Clergy,* by thoſe Conſtitutions made in a Parliament at *Clarendon,* whereby he reſtrained the Exorbitant Check'd the *Pope.*

Power of the Eccleſiaſticks, and the Exemption they claimed from Secular Juriſdiction. And,

Conquered *Ireland*. *Thirdly*, He ſubdued and conquered *Ireland*, and added it to the Crown of *England*, which Conqueſt was begun by *Richard* Earl of *Stigule* or *Strongbow*, 14 *H.* 2. But was perfected by the King himſelf in the Seventeenth Year of his Reign, and for the greater Solemnity of the Buſineſs, was ratified by the Fealties of the Biſhops and Nobles of *Ireland*, and by a *Bull* of Confirmation from *Pope Alexander*, who was willing to intereſt himſelf in that Buſineſs, to ingratiate himſelf with the King, and to gain a Pretence for that arrogant Uſurpation of diſpoſing of Temporal Dominions. *Vide Hoveden, Anno* 14 *H.* 2.

K. *Rich.* I. *Richard* I. eldeſt Son of King *Henry* II. ſucceeded his Father. I have ſeen little of Record touching the Juridical Proceedings, either of him, or his ſaid Father, other than what occurs in the *Pipe-Rolls* in the *Exchequer*, which both in the Time of *Hen.* II. *Rich.* I. and King *John*, and all the ſucceeding Kings, are fairly preſerved; and the beſt Remembrances that we have of this King's Reign, in relation to the Law, are what *Roger Hoveden*'s *Annals* have delivered down to us, *viz.*

His Naval Laws, *&c.* *Firſt*, He inſtituted a Body of Naval Laws in his Return from the *Holy Land*, in the Iſland of *Oleron*, which are yet extant with ſome Additions; *De quibus*, *Vide* Mr. *Selden*'s *Mare Clauſum*, *Lib.* 2. *cap.* 24. and I ſuppoſe they

they are the ſame which are attributed to him by *Mat. Paris*, *Anno* 1196. and he conſtituted Juſtices to put them in Execution.

Secondly, He obſerved the ſame Method of diſtributing Juſtice as his Father had begun, by Juſtices *Itinerant per ſingulos Angliæ Comitatus*, to whom he delivered two Kinds of Extracts or Articles of Inquiry, *viz. Capitula Coronæ*, much reformed and augmented from what they were before, and *Capitula de Judæis*; the whole may be read in *Hoveden*, *fo.* 423. *ſub Anno* 5 *R.* 1. and by thoſe Articles it appears, That at that Time there was a ſettled Court for the *Common-Pleas*, as well as for the *Queen's-Bench*, tho' it ſeems that Pleas of Land were then indifferently held in either, as appears by the firſt and ſecond Articles thereof, where we have, *Placita per breve Domini Regis, vel per breve Capitalis Juſticiæ, vel a Capitali Curia Regis coram eis (Juſticiis) miſſa*: The former whereof ſeems to be the *Common-Pleas*, which held Pleas by Original Writ, which Writ was under the King's Teſte when he was in *England*; but when he was beyond the Seas, it was under the Teſte of the *Juſticiarius Angliæ*, as the *Cuſtos Regni* in the King's Abſence. Articles of Juſtices *Itinerant*.

The Power which the Juſtices *Itinerant* had to hold Plea in Writs of Right, or the Grand Aſſize, was ſometimes limited, as here by the *Articuli Coronæ* under *Hen.* II. to half a Knight's Fee, or under: For here in theſe Articles it is, *De Magnis Aſſiſis quæ ſunt de*

centum Solidis & infra. But in the next Commissions, Instructions, or *Capitula Coronæ*, it is, *De Magnis Assisis usque ad Decem Libratas Terre & infra.*

Weights and Measures.

In his Eighth Year, he established a Common Rule for *Weights and Measures* throughout *England*, called *Assisa de Mensuris*, wherein we find the Measure of Woollen Cloths was then the same with that of *Magna Charta*, 9 *H.* 3. viz. *De duobus ulnis infra Lisuras.*

In the Year before his Death, the like Justices Errant went through many Counties of *England*, to whom Articles, or *Capitula placitorum Coronæ*, not much unlike the former were delivered. *Vide Hoveden, sub Anno* 1198. *fo.* 445.

And in the same Year, he issued Commissions in the *Trent*, *Hugh de Neville* being Chief Justice; and to those were also delivered Articles of Inquiry, commonly called *Assisæ de Foresta*, which may be read at large in *Hoveden, sub eodem Anno.* These gave great Discontent to the Kingdom, for both the Laws of the Forest, and their Execution were rigorous and grievous.

K. *John.*

King *John* succeeded his said Brother, both in the Kingdom of *England*, and Dutchy of *Normandy*; the Evidence that we have, touching the Progress of the Laws of his Time, are principally Three, *viz.* *First*, His Charters of Liberties. 2*dly*, The Records of Pleadings and Proceedings in his Courts; And 3*dly*, The Course he took for settling the *English* Laws in *Ireland.*

1. Touch-

1. Touching the first of these, his Charters of the Liberties of *England*, and of the *Forest*, were hardly, and with Difficulty, gained by his Baronage at *Stanes*, *Anno Dom.* 1215. The Collection of the former was, as *Mat. Paris* tells us, upon the View of the Charter or Laws of King *Hen.* I. which says, he contained *quasdam Libertates & Leges a Rege Edvardo Sancto, Ecclesiæ & Magnatibus concessas, exceptis quibusdam Libertatibus quas idem Rex de suo adjecit*; and that thereupon the Baronage fell into a Resolution to have those Laws granted by King *John*. But as it is certain, that the Laws added by King *Hen.* I. to those of the *Confessor* were many more, and much differing from his; so the Laws contained in the Great Charter of King *John*, differed much from those of King *Hen.* I. Neither are we to think, that the Charter of King *John* contained all the Laws of *England*, but only or principally such as were of a more comprehensive Nature, and concerned the common Rights and Liberties of the Church, Baronage and Commonalty which were of the greatest Moment, and had been most invaded by King *John*'s Father and Brother. 1. His Charters.

The lesser Charter, or *De Foresta*, was to reform the Excesses and Encroachments which were made, especially in the Time of *Rich.* I. and *Hen.* II. who had made New Afforestations, and much extended the Rigour of the Forest Laws: And both these Charters do in Substance agree with that

Magna Charta, & de Foresta, granted and confirm'd in 9 *Hen.* 3. I shall not need to recite them, or to make any Collections or Inferences from them; they are both extant in the *Red Book* of the *Exchequer*, and in *Mat. Paris, sub Anno* 1215. and the Record and the Historian do *Verbatim* agree.

2. Records, &c. As to the Second Evidence we have of the Progress of the Laws in King *John*'s Time, they are the Records of Pleadings and Proceedings which are still extant: But altho' this King endeavoured to bring the Law, and the Pleadings and Proceedings thereof, to some better Order than he found it; for saving his Profits whereof, he was very studious, and for the better Reduction of it into Order and Method, we find frequently in the Records of his Time, Fines imposed, *pro Stultiloquio*, which were no other than Mulcts imposed by the Court for barbarous and disorderly Pleading: From whence afterwards that Common Fine arose, *Pro pulchre placitando*, which was indeed no other than a Fine for want of it; and yet for all this, the Proceeding in his Courts were rude, imperfect, and defective, to what they were in the ensuing Times of *Edw.* I. *&c.* But some few Observables I shall take Notice of upon the Perusal of the Judicial Records of the Time of King *John, viz.*

His Courts, &c. 1*st*, That the Courts of *King's-Bench* and *Common-Pleas* were then distinct Courts, and distinct-

distinctly held from the Begining to the End of King *John*'s Reign.

2dly, That as yet, neither one nor both of those Courts dispatch'd the Business of the Kingdom, but a great Part thereof was dispatch'd by the *Justices Itinerant*, which were sometimes in Use, but not without their Intermissions, and much of the Publick Business was dispatch'd in the County Courts, and in other inferior Courts; and so it continued, tho' with a gradual Decrease till the End of King *Edw.* I. and for some Time after: And hence it was, That in those elder Times, the Profits of those County Courts for which the Sheriff answered in his Farm, *de Proficuis Comitatus*; also Fines were levied there, and *post Fines*, and Fines *pro licentia concordandi*, and great Fines there answered; Fines *pro Inquisitionibus habendi*, Fines for Misdemeanors, tho' called Amerciaments, arose to great Sums, as will appear to any who shall peruse the ancient *Visc ontiels*.

But, as I said before, the Business of Inferior Courts grew gradually less and less, and consequently their Profits and Business of any Moment came to the Great Courts, where they were dispatch'd with greater Justice and Equality. Besides, the greater Courts observing what Partiality and Brocage was used in the Inferior Courts, gave a pretty quick Ear to Writs of false Judgment, which was the Appeal the Law allowed from erroneous Judgments in the County Courts; and this, by Degrees, wasted the Credit and Business of those inferior Courts.

3*dly*, That the Distinction between the *King's-Bench* and *Common-Bench*, as to the Point of *Communia placita*, was not yet, nor for some Time after, settled; and hence it is, that frequently in the Time of King *John*, we shall find that *Common Pleas* were held in *B. R.* yea, in *Mich. & Hill.* 13 *Johannis*, a Fine is levied *coram ipso Rege*, between *Gilbert Fitz. Roger* and *Helwise* his Wife, Plaintiffs, and *Robert Barpyard* Tenant of certain Lands in *Kirby*, &c.

And again, whereas there was frequently a Liberty granted anciently by the Kings of *England*, and allowed, *Quod non implacitetur nisi coram Rege*; I find *inter Placita de diversis Terminis secundo Johannis*, That upon a Suit between *Henry de Rachola*, and the Abbot of *Leicester* before the Justices *de Banco*, the Abbot pleaded the Charter of King *Richard* I. *Quod idem Abbas pro nullo respondeat nisi coram ipso Rege vel Capitali Justitiario suo*; and it is ruled against the Abbot, *Quia omnia Placita quæ coram* Justic. de Banco *tenentur, coram Domino Regi vel ejus Capitali Justitiario teneri intelliguntur.* But this Point was afterwards settled by the Statute of *Magna Charta*, *Quod Communia placita non sequantur Curiam nostram.*

4*thly*, That the four Terms were then held according as was used in After-times with little Variance, and had the same Denominations they still retain.

5*thly*, That there were oftentimes considerable Sums of Money, or Horses, or other Things given to obtain Justice; sometimes 'tis

'tis ſaid to be, *pro habenda Inquiſitione ut ſupra*, and *inter placita incerti temporis Regis Johannis.* The Men of *Yarmouth* againſt the Men of *Haſtings* and *Winchelſea*, *Aſſerunt Domino Regi tres Palfridos, & ſex Aſturias Narenſes ad Inquiſitionem habendam per Legales*, &c. and frequently the ſame was done, and often accounted for in the *Pipe-Rolls*, under the Name of *Oblata*; and to remedy this Abuſe, was the Proviſion made in King *John*'s and King *Hen.* III.d's Charters, *Nulli Vendemus Juſtitiam vel Rectum.* But yet Fines upon Originals being certain, have continued to this Day, notwithſtanding that Proviſion; but thoſe enormous *Oblata* before-mentioned, are thereby remedied and taken away.

6thly, That in all the Time of King *John*, the Purgation *per Ignem & Aquam*, or the Trial by *Ordeal*, continued, as appears by frequent Entries upon the Rolls; but it ſeems to have ended with this King, for I do not find it in Uſe in any Time after: Perchance the Barbarouſneſs of the Trial, and Perſwaſives of the Clergy, prevailed at length to antiquate it, for many Canons had been made againſt it.

7thly, In this King's Time, the Deſcent of Socage as well as Knight's Service Lands to the eldeſt Son prevailed in all Places, unleſs there were a ſpecial Cuſtom, that the Lands were partible *inter Maſculos*; and therefore, *Mich. ſecundo Johannis*, in *a rationabili parte Bonorum*, by *Gilbert Beville* againſt *William Beville* his elder Brother for Lands in *Gunthorpe*, the Defendant pleaded,

Quod

Quod nunquam partita vel partibilia fuere; and becauſe the Defendant could not prove it, Judgment was given for the Demandant: And by degrees it prevail'd ſo, that whereas at this Time the Averment came on the Part of the Heir at Law, that the Land *nunquam partita vel partibilis extetit*; in a little Time after the Averment was turn'd on the other Hand, *viz.* That tho' the Land was Socage, yet unleſs he did aver and prove that it was *partita & partibilis*, he failed in his Demand.

Thirdly, The third Inſtance of the *Progreſs* of King *John*'s Reign, in relation to the Common Law, was his ſettling the ſame in *Ireland*, which he made his more immediate and particular Buſineſs: But hereof we ſhall add a particular Chapter by it ſelf, when we have ſhewn you what Proceedings and Progreſs was made therein in the Time of *Edw.* I. The many and great Troubles that fell upon King *John* and the whole Kingdom, eſpecially towards the later End of his Reign, did much hinder the good Effect of ſettling the Laws of *England*, and conſequently the Peace thereof, which might have been bottom'd, eſpecially upon the *Great Charter*. But this Unfortunate Prince and Kingdom were ſo intangled with inteſtine Wars, and with the Invaſion of the *French*, who aſſiſted the *Engliſh* Barons againſt their King, and by the Advantages and Uſurpations that the *Pope* and the *Clergy* made

made by those Distempers, that all ended in a Confusion with the King's Death.

I come therefore to the long and troublesome Reign of *Hen.* III. who was about Nine Years old at his Father's Death; he being born *in Festo sancti Remigii*, 1207. and King *John* died *in Festo sancti Lucæ*, 1216. and the young King was crowned the 28th of *October*, being then in the Tenth Year of his Age, and was under the Tutelage of *William* Earl-Marshal. K. *Hen.* III. History of his Charters.

The *Nobility* were quick and earnest, notwithstanding his Minority, to have the Liberties and Laws of the Kingdom confirm'd; and Preparatory thereto, in the Year 1223, Writs issued to the several Counties to inquire, by Twelve good and lawful Knights, *Quæ fuerunt Libertates in Anglia tempore Regni Henrici avi sui*, returnable *quindena Paschæ*. What Success those Inquisitions had, or what Returns were made thereof, appears not: But in the next Year following, the young King standing in Need of a Supply of Money from the Clergy and Laity, none would be granted, unless the Liberties of the Kingdom were confirm'd as they were express'd and contain'd in the Two Charters of King *John*; which the King accordingly granted in his Parliament at *Westminster*, and they were accordingly proclaimed, *Ita quod Chartæ utrorumque Regum in nulla inveniatur dissimiles*, *Mat. Paris*, *Anno* 1224.

In the Year 1227. The King holding his Parliament at *Oxford*, and being now of full Age;

Age; by ill Advice, causes the Two Charters he had formerly granted to be cancell'd, *Hanc occasionem prætendens quod Chartæ illæ concessæ fuerunt & Libertates scriptæ & signatæ dum ipse erat sub Custodia nec sui Corporis aut sigilli aliquam potestatem habuit, unde viribus carere debuit, &c.* Which Fact occasioned a great Disturbance in the Kingdom: And this Inconstancy in the King, was in Truth the Foundation of all his future Troubles, and yet was ineffectual to his End and Purpose; for those Charters were not avoidable for the King's Nonage, and if there could have been any such Pretence, that alone would not avoid them, for they were Laws confirm'd in Parliament.

But the Great Charter, and the Charter of the *Forest*, did not expire so; for in 1253, they were again sealed and published: And because after the Battle of *Evesham*, the King had wholly subdued the Barons, and thereby a Jealousie might grow, that he again meant to infringe it; in the Parliament at *Marlbridge*, *cap.* 5. they are again confirm'd. And thus we have the great Settlement of the Laws and Liberties of the Kingdom established in this King's Time: The Charters themselves are not every Word the same with those of King *John*, but they differ very little in Substance.

This Great Charter, and *Charta de Foresta*, was the great Basis upon which this Settlement of the *English* Laws stood in the Time of this King and his Son; there were also some additional Laws of this King yet extant, which

which much poliſhed the Common Law, *viz.* The Statutes of *Merton* and *Marlbridge*, and ſome others.

We have likewiſe Two other principal Monuments of the great Advance and Perfection that the *Engliſh* Laws attained to under this King, *viz.* The Tractate of *Bracton*, and thoſe Records of Plea, as well in both Benches, as before the *Juſtices Itinerant*, the Records whereof are ſtill extant.

Touching the former, *viz.* *Bracton*'s Tractate, it yields us a great Evidence of the Growth of the Laws between the Times of *Henry* II. and *Hen.* III. If we do but compare *Glanville*'s Book with that of *Bracton*, we ſhall ſee a very great Advance of the Law in the Writings of the later, over what they are in *Glanville*. It will be Needleſs to inſtance Particulars; ſome of the Writs and Proceſs do indeed in Subſtance agree, but the Proceedings are much more regular and ſettled, as they are in *Bracton*, above what they are in *Glanville*. The Book it ſelf in the Beginning ſeems to borrow its Method from the Civil Law; but the greateſt part of the Subſtance is either of the Courſe of Proceedings in the Law known to the Author, or of Reſolutions and Deciſions in the Courts of *King's-Bench* and *Common-Bench*, and before *Juſtices Itinerant*, for now the inferior Courts began to be of little Uſe or Eſteem. *Bracton's Treatiſe.*

As to the Judicial Records of the Time of this King, they were grown to a much greater Degree of Perfection, and the Pleadings *Records, Temp. Hen. III.*

dings more orderly, many of which are extant: But the great Troubles, and the Civil Wars, that happened in his Time, gave a great Interruption to the legal Proceedings of Courts; they had a particular Commission and Judicatory for Matters happening in Time of War, ſtiled, *Placita de Tempore Turbationis*, wherein are many excellent Things: They were made principally about the Battle of *Eveſham*, and after it; and for ſettling of the Differences of this Kingdom, was the *Dictum*, or *Edictum de Kenelworth* made which is printed in the old *Magna Charta*.

We have little extant of Reſolutions in this King's Time, but what are either remembred by *Bracton*, or ſome few broken and ſcattered Reports collected by *Fitzherbert* in his Abridgment. There are alſo ſome few Sums or Conſtitutions relative to the Law, which tho' poſſibly not Acts of Parliament, yet have obtained in Uſe as ſuch; as *De diſtrictione Scaccarii*, *Statutum Panis & Cerviſiæ*, *Dies Communes in Banco*, *Statutum Hiberniæ*, *Stat. de Scaccario*, *Judicium Colliſtrigii*, and others.

K. *Edw.* I. We come now to the Time of *Edw.* I. who is well ſtiled our *Engliſh Juſtinian*; for in his Time the Law, *quaſi per Saltum*, obtained a very great Perfection. The Pleadings are ſhort indeed, but excellently good and perſpicuous: And altho' for ſome Time ſome of thoſe Imperfections and ancient inconvenient Rules obtain'd; as for Inſtance, in point of Deſcents, where the middle Brother held

3. of

of the Eldeſt, and dying without Iſſue, the Lands deſcended to the Youngeſt, upon that old Rule in the Time of *Hen.* II. *Nemo poteſt eſſe Dominus & Hæres*, mentioned in *Glanville*, at leaſt if he had once received Homage, 13 *E.* 1. *Fitz. Avowry* 235. Yet the Laws did never in any one Age receive ſo great and ſudden an Advancement; nay, I think I may ſafely ſay, all the Ages ſince his Time have not done ſo much in reference to the orderly ſettling and eſtabliſhing of the diſtributive Juſtice of this Kingdom, as he did within a ſhort Compaſs of the Thirty five Years of his Reign, eſpecially about the firſt Thirteen Years thereof.

Indeed, many Penal Statutes and Proviſions, in relation to the Peace and good Government of the Kingdom, have been ſince made. But as touching the Common Adminiſtration of Juſtice between Party and Party, and accommodating of the Rules, and of the Methods and Orders of Proceeding, he did the moſt, at leaſt of any King ſince *William* I. and left the ſame as a fix'd and ſtable Rule and Order of Proceeding, very little differing from that which we now hold and practice, eſpecially as to the Subſtance and Principal Contexture thereof.

It would be the Buſineſs of a Volume to ſet down all the Particulars, and therefore I ſhall only give ſome ſhort Obſervations touching the ſame.

Firſt,

1. *First*, He perfectly ſettled the Great Charter, and *Charta de Foreſta*, not only by a Practice conſonant to them in the Diſtribution of Law and Right, but alſo by that ſolemn Act paſſed 25 *E.* 1. and ſtiled *Confirmationes Chartarum.*

2. *Secondly*, He eſtabliſhed and diſtributed the ſeveral Juriſdictions of Courts within their proper Bounds. And becauſe this Head has ſeveral Branches, I ſhall ſubdivide the ſame, *viz.*

1. He check'd the Incroachments and Inſolencies of the *Pope* and the *Clergy*, by the Statute of *Carliſle.*

2. He declared the Limits and Bounds of the Eccleſiaſtical Juriſdiction, by the Statute of *Circumſpecte Agatis & Articuli Cleri.* For *note*, Tho' this later Statute was not publiſhed till *Edw.* II. yet was compiled in the Beginning of *Edw.* I.

3. He eſtabliſhed the Limits of the Court of *Common-Pleas*, perfectly performing the Direction of *Magna Charta*, *Quod Communia placita non ſequantur Curia noſtra*, in relation to *B. R.* and in expreſs Terms, extending it to the Court of *Exchequer* by the Statute of *Articuli ſuper Chartas*, cap. 4. It is true, upon my firſt reading of the *Placita de Banco* of *Edw.* I. I found very many Appeals of Death, of Rape, and of Robbery therein; and therefore I doubted, whether the ſame were not held at leaſt by Writ in the *Common Pleas* Court: But upon better Inquiry, I found many of the Records before *Juſtices*

Itinerants were enter'd or fill'd up among the Records of the *Common-Pleas*, which might occaſion that Miſtake.

4. He eſtabliſh'd the Extent of the Juriſdiction of the Steward and Marſhal. *Vide Articuli ſuper Chartas, cap.* 3. And,

5. He alſo ſettled the Bounds of Inferior Courts, not only of Counties, Hundreds, and Courts Baron, which he kept within their proper and narrow Bounds, for the Reaſons given before; and ſo gradually the Common Juſtice of the Kingdom came to be adminiſtred by Men knowing in the Laws, and converſant in the Great Courts of *B. R.* and *C. B.* and before *Juſtices Itinerant*; and alſo by that excellent Statute of *Weſtminſter* 1. *cap.* 35. he kept the Courts of Great Men within their Limits under ſeveral Penalties, wherein ordinarily very great Incroachments and Oppreſſions were exerciſed.

The *Third* general Obſervation I make is, He did not only explain, but excellently enforc'd, *Magna Charta*, by the Statute *De Tallagio non concedendo*, 34 *E.* 1. 3.

Fourthly, He provided againſt the Interruption of the Common Juſtice of the Kingdom, by Mandates under the Great Seal, or Privy Seal, by the Statute of *Articuli ſuper Chartas, cap.* 6. which, notwithſtanding *Magna Charta*, had formerly been frequent in Uſe. 4.

Fifthly, He ſettled the Forms, Solemnities, and Efficacies of Fines, confining them to 5.

the *Common-Pleas*, and to *Justices Itinerant*, and appointed the Place where they brought the Records after their Circuits, whereby one common Repository might be kept of Assurances of Lands; which he did by the Statute *De modo levandi Fines*, 18 *E.* 1.

6. *Sixthly*, He settled that great and orderly Method for the Safety and Preservation of the Peace of the Kingdom, and surpressing of Robberies, by the Statute of *Winton*.

7. *Seventhly*, He settled the Method of Tenures, to prevent Multiplicity of Penalties, which grew to a great Inconvenience, and remedied it by the Statute of *Quia Emptores Terrarum*, 18 *E.* 1.

8. *Eighthly*, He settled a speedier Way for Recovery of Debts, not only for Merchants and Tradesmen, by the Statutes of *Acton*, *Burnel*, *& de Mercatoribus*, but also for other Persons, by granting an Execution for a Moiety of the Lands by *Elegit*.

9. *Ninthly*, He made effectual Provision for Recovery of Advowsons and Presentations to Churches, which was before infinitely lame and defective, by Statute *Westminster* 2. *cap.* 1.

10. *Tenthly*, He made that great Alteration in Estates from what they were formerly, by Statute *Westminster* 2. *cap.* 1. whereby Estates of Fee-Simple, conditional at Common Law, were turn'd into Estates-Tail, not removable from the Issue by the ordinary Methods of Alienation; and upon this Statute, and for the Qualifications hereof, are the Superstructures

ſtructures built of 4 *H.* 7. *cap.* 32. 32 *H.* 8. *cap.* and 33 *H.* 8.

Eleventhly, He introduced quite a new Method, both in the Laws of *Wales*, and in the Method of their Diſpenſation, by the Statute of *Rutland*. 11.

Twelfthly, In brief, partly by the Learning and Experience of his Judges, and partly by his own wiſe Interpoſition, he ſilently and without Noiſe abrogated many ill and inconvenient Uſages, both in his Courts of Juſtice, and in the Country. He rectified and ſet in Order the Method of collecting his Revenue in the *Exchequer*, and removed obſolete and illeviable Parts thereof out of Charge; and by the Statutes of *Weſtminſter* 1. and *Weſtminſter* 2. *Glouceſter* and *Weſtminſter* 3. and of *Articuli ſuper Chartas*, he did remove almoſt all that was either grievous or impractical out of the Law, and the Courſe of its Adminiſtration, and ſubſtituted ſuch apt, ſhort, pithy, and effectual Remedies and Proviſions, as by the Length of Time and Experience, had of their Convenience, have ſtood ever ſince without any great Alteration, and are now as it were incorporated into, and become a Part of the Common Law it ſelf. 12.

Upon the whole Matter, it appears, That the very Scheme, Mold and Model of the Common Law, eſpecially in relation to the Adminiſtration of the Common Juſtice between Party and Party, as it was highly rectified and ſet in a much better Light and

Order by this King than his Predeceſſors left it to him, ſo in a very great Meaſure it has continued the ſame in all ſucceeding Ages to this Day; ſo that the Mark or *Epocha* we are to take for the true Stating of the Law of *England, what it is*, is to be conſidered, ſtated and eſtimated, from what it was when this King left it. Before his Time it was in a great Meaſure rude and unpoliſh'd, in compariſon of what it was after his Reduction thereof; and on the other Side, as it was thus poliſhed and ordered by him, ſo has it ſtood hitherto without any great or conſiderable Alteration, abating ſome few Additions and Alterations which ſucceeding Times have made, which for the moſt part are in the ſubject Matter of the Laws themſelves, and not ſo much in the Rules, Methods, or Ways of its Adminiſtration.

Repoſitories of the Law.

As I before obſerved ſome of thoſe many great Acceſſions to the Perfection of the Law under this King, ſo I ſhall now obſerve ſome of thoſe Boxes or Repoſitories where they may be found, which are of the following Kinds, *viz.*

1. *Firſt*, The Acts of Parliament in the Time of this King are full of excellent Wiſdom and Perſpicuity, yet Brevity; but of this, enough before is ſaid.

2. *Secondly*, The Judicial Records in the Time of this King. I ſhall not mention thoſe of the *Chancery*, the Cloſe-Patent and Charter Rolls, which yet will very much evidence the

the Learning and Judgment of that Time; but I ſhall mention the Rolls of Judicial Proceedings, eſpecially thoſe in the *King's-Bench* and *Common-Pleas*, and in the *Eyres*. I have read over many of them, and do generally obſerve:

1. That they are written in an excellent Hand.

2. That the Pleading is very ſhort, but very clear and perſpicuous, and neither looſe or uncertain, nor perplexing the Matter either with Impropriety, Obſcurity, or Multiplicity of Words: They are clearly and orderly digeſted, effectually repreſenting the Buſineſs that they intend.

3. That the Title and the Reaſon of the Law upon which they proceed (which many times is expreſly delivered upon the Record it ſelf) is perſpicuous, clear and rational; ſo that their ſhort and pithy Pleadings and Judgments do far better render the Senſe of the Buſineſs, and the Reaſons thereof, than thoſe long, intricate, perplexed, and formal Pleadings, that oftentimes of late are unneceſſarily uſed.

Thirdly, The Reports of the Terms and Years of this King's Time, a few broken Caſes whereof are in *Fitzherbert's* Abridgment; but we have no ſucceſſive Terms or Years thereof, but only ancient Manuſcripts perchance, not running through the whole Time of this King, yet they are very good, but very brief: Either the Judges then ſpoke leſs, or the Reporters were not ſo ready handed as to take all they ſaid. And hence 3.

this Brevity makes them the more obscure. But yet in those brief Interlocutions between the Judge and the Pleaders, and in their Definitions, there appears a great deal of Learning and Judgment. Some of those Reports, tho' broken, yet the best of their Kind, are in *Lincolns-Inn* Library. *Quære, if those Reports are not now published.*

4. *Fourthly*, The Tracts written or collected in the Time of this wise and excellent Prince, which seem to be of Two Kinds, *viz.* such as were only the Tractates of private Men, and therefore had no greater Authority than private Collections, yet contain much of the Law then in Use, as *Fleta* the Mirror, *Britton* and *Thornton*; or else, *2dly*, They were Sums or Abstracts of some particular Parts of the Law, as *Novæ Narrationes, Hengam Magna & Parva, Cadit assisa Summa, De Bastardia Summa*; by all which, compared even with *Bracton*, there appears a Growth and a Perfecting of the Law into a greater Regularity and Order.

And thus much shall serve for the several Periods or Growth of the Common Law untill the Time of *Edw.* I. inclusively, wherein having been somewhat prolix, I shall be the briefer in what follows, especially seeing that from this Time downwards, the Books and Reports printed give a full Account of the ensuing Progress of the Law.

CHAP.

CHAP. VIII.

A Brief Continuation of the Progreſs of the Laws, from the Time of King Edward II. *inclusive, down to theſe Times.*

HAving in the former Chapter been ſomewhat large in Diſcourſing of the Progreſs of the Laws, and the incidental Additions they received in the ſeveral Reigns of King *William* II. King *Hen.* I. King *Stephen*, King *Hen.* II. King *Richard* I. King *John*, King *Hen.* III. and King *Edw.* I. I ſhall now proceed to give a brief Account of the Progreſs thereof in the Time of *Edw.* II. and the ſucceeding Reigns, down to theſe Times.

Edward II. ſucceeding his Father, tho' he was an Unfortunate Prince, and by reaſon of the Troubles and Unevenneſs of his Reign, the very Law it ſelf had many Interruptions, yet it held its Current in a great Meaſure according to that Frame and State that his Father had left it in. K. *Ed.* II.

Beſides the Records of Judicial Proceedings in his Time, many whereof are ſtill extant, there were ſome other Things that occurr'd in his Reign which give us ſome kind of Indication of the State and Condition of the Law during that Reign: As,

1. *First*, The Statutes made in his Time, and especially that of 17 *E.* 2. stiled *De Prerogativa Regis*, which tho' it be called a Statute, yet for the most part is but a Sum or Collection of certain of the King's Prerogatives that were known Law long before; as for Instance, The King's Wardship of Lands *in Capite* attracting the Wardship of Lands held of others; The King's Grant of a Manor not carrying an Advowson Appendant unless named; The King's Title to the Escheat of the Lands of the *Normans*, which was in Use from the first Defection of *Normandy* under King *John*; The King's Title to Wreck, Royal Fish, Treasure Trove, and many others, which were ancient Prerogatives to the Crown.

2. *Secondly*, The Reports of the Years and Terms of this King's Reign; these are not printed in any one entire Volume, or in any Series or Order of Time, only some broken Cases thereof in *Fitzherbert*'s Abridgment, and in some other Books dispersedly, yet there are many entire Copies thereof abroad very exellently reported, wherein are many Resolutions agreeing with those of *Edw.* I.'s Time. The best Copy of these Reports that I know now extant, is that in *Lincolns-Inn* Library, which gives a fair Specimen of the Learning of the Pleaders and Judges of that Time. *Quære, If* Maynard's *Edw.* II. *was not printed from that Copy.*

K. Ed. III. King *Edw.* III. succeeded his Father; his Reign was long, and under it the Law was improved to the greatest Height. The Judges and

and Pleaders were very learned: The Pleadings are somewhat more polished than those in the Time of *Edw.* I. yet they have neither Uncertainty, Prolixity, nor Obscurity. They were plain and skilful, and in the Rules of Law, especially in relation to real Actions, and Titles of Inheritance, very learned and excellently polished, and exceeded those of the Time of *Edw.* I. So that at the latter End of this King's Reign the Laws seemed to be near its *Meridian.*

The Reports of this King's Time run from the Beginning to the End of his Reign, excepting some few Years between the 10th and 17th, and 30th and 33d Years of his Reign; but those Omitted Years are extant in many Hands in old Manuscripts. And *Quære, If they are not all printed in* Maynard's *Edw.* III.

The Book of Assizes is a Collection of the Assizes that happened in the Time of *Edw.* III. being from the Beginning to the End extracted out of the Books and Assizes of those that attended the Assizes in the Country.

The *Justices Itinerant* continued by intermitting Vicissitudes till about the 4th of *Edw.* 3. and some till the 10th of *Edw.* 3. Their Jurisdiction extended to Pleas of the Crown, or Criminal Causes, Civil Suits and Pleas of Liberties, and *Quo Warranto's*; the Reports thereof are not printed, but are in many Hands in Manuscript, both of the Times of *Edw.* I. *Edw.* II. and *Edw.* III. full of excellent Learning. Some few broken Reports of those

those *Eyres*, especially of *Cornwall*, *Nottingham*, *Northampton*, and *Derby*, are collected by *Fitzherbert* in his Abridgment.

After the 10th of *Edw.* III. I do not find any Justices Errant *ad Communia Placita*, but only *ad Placita Foreſtæ*; other Things that concerned those *Juſtices Itinerant* were ſupplied and tranſacted in the *Common Bench*, for *Communia placita*, in the *King's-Bench* and *Exchequer* for *Placita de Libertatibus*, and before Juſtices of Aſſize, *Niſi prius*, *Oyer* and *Terminer*, and Goal Delivery for Aſſiſes and Pleas of the Crown.

And thus much for the Law in the Time of *Edw.* III.

K. *Rich.* II. *Richard* II. ſucceeding his Grandfather, the Dignity of the Law, together with the Honour of the Kingdom, by reaſon of the Weakneſs of this Prince, and the Difficulties occurring in his Government, ſeem'd ſomewhat to decline, as may appear by comparing the Twelve laſt Years of *Edw.* III. commonly called *Quadrageſms*, with the Reports of King *Richard* II. wherein appears a viſible Declination of the Learning and Depth of the Judges and Pleaders.

It is true, we have no printed continued Report of this King's Reign; but I have ſeen the entire Years and Terms thereof in a Manuſcript, out of which, or ſome other Copy thereof, I ſuppoſe *Fitzherbert* abſtracted thoſe broken Caſes of this Reign in his Abridgment.

In

In all those former Times, especially from the End of *Edw.* III. back to the Beginning of *Edw.* I. the Learning of the Common Law consisted principally in Assizes and real Actions; and rarely was any Title dermined in any personal Action, unless in Cases of Titles to Rents, or Services by Replevin; and the Reasons thereof were principally these, *viz.*

First, Because these ancient Times were great Favourers of the Possessor, and therefore if about the Time of *Edw.* II. a Disseisor had been in Possession by a Year and a Day, he was not to be put out without a Recovery by Assize. Again, If the Disseisor had made a Feoffment, they did not countenance an Entry upon the Feoffee, because thereby he might lose his Warranty, which he might save if he were Impleaded in an Assize or Writ of Entry; and by this Means real Actions were frequent, and also Assizes.

Secondly, They were willing to quiet Men's Possessions, and therefore after a Recovery or Bar in an Assize or real Action, the Party was driven to an Action of a higher Nature.

Thirdly, Because there was then no known Action wherein a Person could recover his Possession, other than by an Assize or a real Action; for till the End of *Edw.* IV. the Possession was not recovered in an *Ejectione firmæ*, but only Damages.

Fourthly, Because an Assize was a speedy and effectual Remedy to recover a Possession,

sion, the Jury being ready Impannell'd, and at the Bar the first Day of the Return. And altho' by Disusage, the Practisers of the Law are not so ready in it, yet the Course thereof in those Times was as ready and as well known to all Professors of the Law as the Course of *Ejectione firmæ* is now.

K. *Hen.* IV. K. *Hen.* V. Touching the Reports of the Years and Terms of *Hen.* IV. and *Hen.* V. I can only say, They do not arrive either in the Nature of the Learning contained in them, or in the Judiciousness and Knowledge of the Judges and Pleaders, nor in any other Respect arise to the Perfection of the last Twelve Years of *Edw.* III.

K. *Hen.* VI. K. *Ed.* IV. K. *Ed.* V. and K. *Hen.* VII. But the Times of *Hen.* VI. as also of *Edw.* IV. *Edw.* V. and *Hen.* VII. were Times that abounded with learned and excellent Men. There is little Odds in the Usefulness or Learning of these Books, only the first Part of *Hen.* VI. is more barren, spending it self much in Learning of little Moment, and now out of Use; but the second Part is full of excellent Learning.

In the Times of those Three Kings, *Hen.* VI. *Edw.* IV. and *Hen.* VII. the Learning seems to be much alike. But these two Things are observable in them, and indeed generally in all Reports after the Time of *Edw.* III. *viz.*

1. *First*, That real Actions and Assizes were not so frequent as formerly, but many Titles of Land were determined in personal

nal Actions; and the Reasons hereof seem to be,

1*st*, Because the Learning of them began by little and little to be less kown or understood.

2*dly*, The ancient Strictness of preserving Possessions to Possessors till Eviction by Action began not to be so much in Use, unless in Cases of Discents and Discontinuances, the latter necessarily drove the Demandant to his *Formedon*, or his *Cui in Vita*, *&c.* But the Descents that toll'd Entry were rare, because Men preserved their Rights to enter, *&c.* by continual Claims.

3*dly*, Because the Statute of 8 *H.* 6. had helped Men to an Action to recover their Possessions by a Writ of Forcible Entry, even while the Method of Recovery of Possessions by Ejectments was not known or used.

The *Second* Thing observable is, That 2.
tho' Pleadings in the Times of those Kings were far shorter than afterwards, especially after *Hen.* VIII. yet they were much longer than in the Time of King *Edw.* III. and the Pleaders, yea and the Judges too, became somewhat too curious therein, so that that Art or Dexterity of Pleading, which in its Use, Nature and Design, was only to render the Fact plain and intelligible, and to bring the Matter to Judgment with a convenient Certainty, began to degenerate from its primitive Simplicity, and the true Use and End thereof, and to become a Pice of Nicety and Curiosity; which how these later Times have improved, the Length of the Pleadings, the many and unnecessary Repetitions,

the

the many Miſcarriages of Cauſes upon ſmall and trivial Niceties in Pleading, have too much witneſſed.

I ſhould now ſay ſomething touching the Times ſince *Hen.* VII. to this Day, and therefore ſhall conclude this Chapter with ſome general Obſervations touching the Proceedings of Law in theſe later Times.

And Firſt I ſhall begin where I left before, touching the Length and Nicety of Pleadings, which at this Day far exceeds not only that ſhort yet perſpicuous Courſe of Pleading which was in the Time of *Hen.* VI. *Edw.* IV. and *Hen.* VII. but thoſe of all Times whatſoever, as our vaſt Preſſes of Parchment for any one Plea do abundantly witneſs.

And the Reaſons thereof ſeem to be theſe, *viz.*

Firſt, Becauſe in ancient Times the Pleadings were drawn at the Bar, and the Exceptions (alſo) taken at the Bar, which were rarely taken for the Pleaſure or Curioſity of the Pleader, but only when it was apparent that the Omiſſion or the Matter excepted to was for the moſt part the very Merit and Life of the Cauſe, and purpoſely omitted or miſpleaded becauſe his Matter or Cauſe would bear no better: But now the Pleadings being firſt drawn in Writing, are drawn to an exceſſive Length, and with very much Labouroufneſs and Care enlarged, leſt it might afford an Exception not intended by the Pleader, and

which could be eaſily ſupplied from the Truth of the Caſe, leſt the other Party ſhould catch that Advantage which commonly the adverſe Party ſtudies, not in Contemplation of the Merits or Juſtice of the Cauſe, but to find a Slip to faſten upon, tho' in Truth, either not material to the Merits of the Plea, or at leaſt not to the Merits of the Cauſe, if the Plea were in all Things conform to it.

Secondly, Becauſe thoſe Parts of Pleading which in ancient Times might perhaps be material, but at this Time are become only mere Styles and Forms, are ſtill continued with much Religion, and ſo all thoſe ancient Forms at firſt introduced for Convenience, but now not neceſſary, or it may be antiquated as to their Uſe, are yet continued as Things wonderfully material, tho' they only ſwell the Bulk, but contribute nothing to the Weight of the Plea.

Thirdly, Theſe Pleas being moſtly drawn by Clerks, who are paid for Entries and Copies thereof, the larger the Pleadings are, the more Profits come to them, and the dearer the Clerk's Place is, the dearer he makes the Client pay.

Fourthly, An Overforwardneſs in Courts to give Countenance to frivolous Exceptions, tho' they make nothing to the true Merits of the Cauſe; whereby it often happens that Cauſes are not determined according to their Merits, but do often miſcarry for inconſiderable Omiſſions in Pleading.

But

2. But, *Secondly*, I shall consider what is the Reason that in the Time of *Edw.* I. one Term contained not above two or three Hundred Rolls, but at this Day one Term contains two Thousand Rolls or more.

The Reasons whereof may be these, *viz.*

1*st*, Many petty Businesses, as Trespasses and Debts under 40 *s.* are now brought to *Westminster*, which used to be dispatched in the County or Hundred Courts; and yet the Plaintiffs are not to be blamed, because at this Day those Inferior Courts are so ill served, and Justice there so ill administred, that they were better seek it (where it may be had) at *Westminster*, tho' at somewhat more Expence.

2*dly*, Multitudes of Attornies practising in the Great Courts at *Westminster*, who are ready at every Market to gratifie the Spleen, Spight or Pride, of every Plaintiff.

3*dly*, A great Encrease of People in this Kingdom above what they were anciently, which must needs multiply Suits.

4*thly*, A great Encrease of Trade and Trading Persons, above what there were in ancient Times, which must have the like Effect.

5*thly*, Multitudes of new Laws, both Penal and others, all which breed new Questions, and new Suits at Law, and in particular, the Statute touching the devising of Lands, *cum multis aliis.*

6*thly*, Multiplication of Actions upon the Case, which were rare formerly, and

thereby Wager of Law ouſted, which diſcouraged many Suits: For when Men were ſure, that in caſe they reſted upon a bare Contract without Specialty, the other Party might wage his Law, they would not reſt upon ſuch Contracts without reducing the Debt into a Specialty, if it were of any Value, which created much Certainty, and accorded many Suits.

And herewith I ſhall conclude this Chapter, ſhewing what Progreſs the Law has made, from the Reign of King *Edw.* I. down to theſe Times.

CHAP. IX.

Concerning the settling of the Common Law of England *in* Ireland *and* Wales: *And some Observations touching the Isles of* Man, Jersey *and* Guernsey, *&c.*

Ireland. THE Kingdom of *Ireland* being conquered by *Hen.* II. about the Year 1171. He in his great Council at *Oxon*, constituted his younger Son, *John*, King thereof, who prosecuted that Conquest so fully, that he introduced the *English* Laws into that Kingdom, and swore all the great Men there to the Observation of the same, which Laws were, after the Decease of King *John*, again reinforc'd by the Writ of King *Hen.* III. reciting that of King *John*, *Rot. Claus.* 10 *H.* 3. *Memb.* 8, *&* 10. *Vide infra*, *& Pryn.* 252, 253, *&c.*

And because the Laws of *England* were not so suddenly known there, Writs from Time to Time issued from hence, containing divers *Capitula Legum Angliæ*, and commanding their Observation in *Ireland*, as *Rot. Parl.* 11 *H.* 3. the Law concerning Tenancy by Curtesy, *Rot. Claus.* 20 *H.* 3. *Memb.* 3. *Dorso.* The Law concerning the Preference of the Son born after Marriage, to the Son born of the same Woman before Marriage, or *Bastard eigne & Mulier puisne*, *Rot. Claus.* 20 *H.*

20 *H.* 3. *Memb.* 4. *in Dorso*: So the Law concerning all the Parceners inheriting without doing Homage, and ſeveral Tranſmiſſions of the like Nature.

For tho' King *Hen.* II. had done as much to introduce the *Engliſh* Laws there, as the Nature of the Inhabitants or the Circumſtances of the Times would permit; yet partly for want of Sheriffs, that Kingdom being then not divided into Counties, and partly by reaſon of the Inſtability of the *Iriſh*, he could not fully effect his Deſign: And therefore, King *John*, to ſupply thoſe Defects as far as he was able, divided *Leinſter* and *Munſter* into the ſeveral Counties of *Dublin*, *Kildare*, *Meath*, *Uriel*, *Caterlogh*, *Kilkenny*, *Wexford*, *Waterford*, *Cork*, *Limerick*, *Tiperary*, and *Kerry*; and appointed Sheriffs and other Officers to govern 'em after the Manner of *England*; and likewiſe cauſed an Abſtract of the *Engliſh* Laws under his Great Seal to be tranſmitted thither, and depoſited in the *Exchequer* at *Dublin*: And ſoon after, in an *Iriſh* Parliament, by a general Conſent, and at the Inſtance of the *Iriſh*, he ordain'd, That the *Engliſh* Laws and Cuſtoms ſhould thenceforth be obſerved in *Ireland*, and in order to it, he ſent his Judges thither, and erected Courts of Judicature at *Dublin*. *Vide* 4th Inſt. 149.

But notwithſtanding theſe Precautions of King *John*, yet for that the *Brehon* Law, and other *Iriſh* Cuſtoms, gave more of Power to the great Men, and yet did not reſtrain the Common People to ſo ſtrict and regular

a Discipline as the Laws of *England* did. Therefore the very *English* themselves became corrupted by them, and the *English* Laws soon became of little Use or Esteem, and were look'd upon by the *Irish* and the degenerate *English* as a Yoke of Bondage; so that King *Hen.* III. was oftentimes necessitated to revive 'em, and by several successive Writs to enjoin the Observation of them. And in the Eleventh Year of his Reign he sent the following Writ, *viz.*

1. Inst. 141. N. B. *This Writ is curtail'd by my Lord* Cook.

Henricus Rex, &c. Baronibus Militibus & aliis libere Tenentibus Lageniæ, salutem, &c. Satis ut credimus vestra audivit discretio, quod cum bonæ memoriæ Johannes, quondam Rex Angliæ Pater Noster venit in Hiberniam, ipse duxit secum viros discretos & Legis peritos, quorum Communi Consilio, & ad instantiam Hibernien-sium Statuit & præcepit Leges Anglicanas teneri in Hibernia, ita quod Leges easdem in scriptis readactas reliquit sub sigillo suo ad Scaccar. Dublin. *Cum igitur Consuetudo & Lex Angliæ fuerit, quod si aliquis desponsaverit aliquam Mulierem, sive Viduam sive aliam hæreditatem habentem, & ipse postmodum ex ea prolem suscitaverit, cujus clamor auditus fuerit infra quatuor parietes idem Vir si supervixerit ipsam uxorem suam, habebit tota vita sua Custodiam Hæreditatis uxoris suæ, licet ea forte habuerit Hæredem de primo viro suo qui fuerit* Plenæ *ætatis vobis Mandamus injungentes quatenus in loquela quæ est in Curia Willi. Com. Maresc. inter Mauritium Fitz Gerald Petent. & Galfridum de Marisco Tu-*

Justiciarium nostrum Hiberniæ tenentem, vel in alia Loquela quæ fuerit in Casu prædicto nullo modo Justitiam in contrar' facere præsumatis.

Teste Rege apud Westm. 10 Decemb. *Anno* 11° *Regni Nostri.*

And *Note*, In the same Year another Writ was sent to the Lord Justice, Commanding him to aid the Episcopal Excommunications in *Ireland* with the Secular Arm, as in *England* was used.

And about this Time, *Hubert de Burgo*, the *Chief Justice of* England, and Earl of *Kent*, was made Earl of *Connaught*, and Lord Justice of *Ireland* during Life; and because he could not Personally attend, he on *March* the 10th, 1227. appointed *Richard de Burgo* to be his Deputy, or Lord Justice, to whom the King sent the following Writ:

Rex dilecto & fideli suo Richardo de Burgo Justiciario suo Hiberniæ salutem. Mandamus vobis firmiter Præcipientes, quatenus certo die & loco faciatis venire coram vobis, Archiepiscopos Episcopos Abbates Priores Comites & Barones Milites & libere Tenentes & Ballivos Singulorum Comitatuum, & coram eis publice legi faciatis Chartam Domini Johannis Regis Patris nostri Cui sigillum suum appensum est, quam fieri fecit, & jurari a Magnatibus Hiberniæ de Legibus & consuetudinibus Anglorum Observandis in Hibernia, & Præcipiatis eis ex parte nostra, quod Leges illas & consuetudines in Charta prædicta contentas de cetero firmiter teneant & observent. Et

hoc idem per singulos Comitatus Hiberniæ clamari faciatis, & teneri prohibentes firmiter ex parte nostra & forisfacturam nostram, ne quis contra hoc Mandatum nostrum, venire præsumat. Eo excepto quod nec de Morte nec de catallis hibernensium occisorum nihil statuatur ex parte nostra citra quindecim dies a Sancti Michaelis, Anno Regni Nostri, 12°. Super quo respectum dedimus Magnat. nostri de Hib. usque ad Terminum prædict. Teste Meipso apud Westm. 8° die Maii, Anno Regni Nostri, 12°.

And about the 20th Year of *Hen.* III. several Writs were sent into *Ireland*, especially directing several Statutes which had been made in *England* to be put in Use, and to be observed in *Ireland*; as the Statute of *Merton* in the Case of Bastardy, &c.

But yet it seems by the frequent Grants that were made afterwards to particular Native *Irish* Men, *Quod legibus utantur Anglicanis*, That the Native *Irish* had not the full Priviledge of the *English* Laws, in relation at least to the Liberties of *English* Men, till about the Third of *Edw.* III. *Vide Rot. Claus.* 2 *E.* 3. *Memb.* 17.

As the Common Law of *England* was thus by King *John* and *Hen.* III. introduced into *Ireland*, so in the Tenth of *Hen.* VII. all the precedent Statutes of *England* were there settled by the Parliament of *Ireland*. 'Tis true, many ancient *Irish* Customs continued in *Ireland*, and do continue there even unto this Day; but such as are contrary to the Laws

Laws of *England* are disallowed, *Vide Davis's* Reports, the Case of *Tanistry*.

Wales.

As touching *Wales*, That was not always the Feudal Territory of the Kingdom of *England*; but having been long governed by a Prince of their own, there were very many Laws and Customs used in *Wales*, utterly strange to the Laws of *England*, the Principal whereof they attribute to their King *Howell Dha*.

After King *Edw.* I. had subdued *Wales*, and brought it immediately under his Dominion; He first made a strict Inquisition, touching the *Welsh* Laws within their several *Commotes* and *Seigniores*, which Inquisitions are yet of Record: After which, in the 12th of *Edw.* I. the Statute of *Rutland* was made, whereby the Administration of Justice in *Wales* was settled in a Method very near to the Rule of the Law of *England*. The Preamble of the said Statute is notable, *viz.*

Edvardus Dei gratia Rex Angliæ Dominus Hiberniæ & Dux Acquitaniæ omnibus Fidelibus suis de Terra sua de Snodon & de aliis terris suis in Wallia Salutem in Domino. Divina providentia quæ in sua Dispositione non fallitur, inter alia suæ Dispensationis Munera, quibus nos & Regnum nostrum Angliæ decorari dignata est, Terram Walliæ cum incolis suis prius nobis juri Feodali subjectam, tam sui gratia in proprietatis nostræ Dominium, obstaculis quibuscunque cessantibus, totaliter & cum integritate convertit, &

Coroniæ Regni prædicti tantum partem corporis ejusdem annexuit & univit. Nos, &c.

According to the Method in that Statute prescribed, has the Method of Justice been hitherto administred in *Wales*, with such Alterations and Additions therein as have been made by the several subsequent Statutes of 27 and 34 *H.* 8. *&c.*

The *Isle of Man.* Touching the *Isle of Man.* This was sometimes Parcel of the Kingdom of *Norway*, and governed by particular Laws and Customs of their own, tho' many of them hold Proportion, or bear some Analogy, to the Laws of *England*, and probably were at first and originally derived from hence; seeing the Kingdom of *Norway* as well as the *Isle of Man* have anciently been in Subjection to the Crown of *England*. *Vide Leges Willi. Primi*, in *Lambard's Saxon* Laws.

Berwick. *Berwick* was sometimes Parcel of *Scotland*, but was won by Conquest by King *Edw.* I. and after that lost by King *Edw.* II. and afterwards regained by *Edw.* III. It was governed by the Laws of *Scotland*, and their own particular Customs, and not according to the Rules of the Common Law of *England*, further than as by Custom it is there admitted, as in *Liber Parliamenti*, 21 *E.* 1. in the Case of *Moyne* and *Bartlemew*, *pro Dote* in *Berwick*; yet now by Charter, they send Burgesses to the Parliament of *England*.

Jersey, Guernsey, &c. Touching the *Islands* of *Jersey*, *Guernsey*, *Sark*, and *Alderney*; They were anciently

a

a Part of the Dutchy of *Normandy*, and in that Right, the Kings of *England* held them till the Time of King *John*; but although King *John*, as is before shewn, was unjustly deprived of that Dutchy, yet he kept the *Islands*; and when after that, they were by Force taken from him, he by the like Force regained them, and they have ever since continued in the Possession of the Crown of *England*.

As to their Laws, they are not governed by the Laws of *England*, but by the Laws and Customs of *Normandy*. But not as they are at this Day; for since the actual Division and Separation of those *Islands* from that Dutchy, there have been several New Edicts and Laws made by the Kings of *France* which have much altered the old Law of *Normandy*, which Edicts and Laws bind not in those *Islands*, they having been ever since King *John*'s Time at least under the actual Allegiance of *England*

And hence it is, that tho' there be late Collections of the Laws and Customs of *Normandy*, as *Terrier* and some others, yet they are not of any Authority in those *Islands*; for the Decision of Controversies, as the *Grand Coutumier* of *Normandy* is, which is (at least in the greatest part thereof) a Collection of the Laws of *Normandy* as they stood before the Disjoining of those *Islands* from the Dutchy, *viz.* before the Time of King *Hen.* III. tho' there be in that Collection some Edicts of the Kings of *France* which were made after that Disjunction; and

and those Laws, as I have shewn before, tho' in some Things they agree with the Laws of *England*, yet in many Things they differ, and in some are absolutely repugnant.

And hence it is, that regularly Suits arising in those *Islands* are not to be tried or determined in the King's Courts in *England*, but are to be heard, tried, and determined in those *Islands*, either before the ordinary Courts of *Jurats* there, or by the *Justices Itinerant* there, commissioned under the Great Seal of *England*, to determine Matters there arising; and the Reason is, because their Course of Proceedings, and their Laws, differ from the Course of Proceedings and the Laws of *England*.

And altho' it be true, that in ancient Times, since the Loss of *Normandy*, some scattering Instances are of Pleas moved here touching Things done in those *Islands*, yet the general settled Rule has been to remit them to those *Islands*, to be tried and determined there by their Law; tho' at this Day the Courts at *Westminster* hold Plea of all transitory Actions whersoever they arise, for it cannot appear upon the Record where they did arise.

Mic. 42 *E.* 2. *Rot.* 45. *coram Rege*, A great Complaint was made by Petition, against the Deputy Governor of those *Islands*, for divers Oppressions and Wrongs done there: This Petition was by the Chancellor delivered into the Court of *B. R.* to proceed upon it, whereupon there were Pleadings on both Sides; but because it appeared to be

be for Things done and tranſacted in the ſaid *Iſlands*, Judgment was thus given: *Et quia Negotiam prædict' in Curia hic terminari non poteſt, eo quod Juratores Inſulæ prædict' coram Juſtitiariis hic venire non poſſunt nec de Jure debent, Nec aliqua Negotia infra Inſula prædicta emergentia terminari non debent niſi ſecundum Conſuet. Inſulæ Predictæ. Ideo Recordum retro traditur Cancellario ut inde fiat Commiſſio Domini Regis ad Negotia prædicta in Inſula prædicta audienda & Terminanda ſecundum Conſuet. Inſulæ prædictæ.*

And accordingly 14 *Junii*, 1565. upon a Report from the Attorney General, and Advice with the two Chief Juſtices, a general Direction was given by the Queen and her Council, That all Suits between the *Iſlanders*, or wherein one Party was an *Iſlander*, for Matters ariſing within the *Iſlands*, ſhould be there heard and determined.

But ſtill this is to be taken with this Diſtinction and Limitation, *viz.* That where the Suit is immediately for the King, there the King may make his Suit in any of the Courts here, eſpecially in the Court of *King's-Bench*: For Inſtance, in *a Quare Impedit* brought by the King in *B. R.* here for a Church in thoſe *Iſlands*; ſo in a *Quo Warranto* for Liberties there; ſo a Demand of Redemption of Lands ſold by the King's Tenant within a Year and a Day according to the Cuſtom of *Normandy*; ſo in an Information for a Riot, or grand Contempt againſt a Governor deputed by the King. Theſe and the like Suits have been maintained

tained by the King in his Court of *King's-Bench* here, tho' for Matters arising within those *Islands*: This appears, *Paschæ* 16 *E.* 2. *coram Rege, Rot.* 82. *Mich.* 18 *E.* 2. *Rot.* 123, 124, 125. *& Pas.* 1 *E.* 3. *Rot.* 59.

And for the same Reason it is, that a Writ of *Habeas Corpus* lies into those *Islands* for one Imprisoned there, for the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty; and therefore a Return must be made of this Writ, to give the Court an Account of the Cause of Imprisonment; for no Liberty, whether of a *County Palatine*, or other, holds Place against those *Brevia Mandatoria*, as that great Instance of punishing the Bishop of *Durham* for refusing to execute a Writ of *Habeas Corpus* out of the *King's-Bench*, 33 *E.* 1. makes evident.

And as Pleas arising in the *Islands* regularly, ought not in the first Instance to be deduced into the Courts here, (except in King's Case;) so neither ought they to be deduced into the King's Courts here in the second Instance; and therefore if a Sentence or Judgment be given in the *Islands*, the Party grieved thereby, may have his Appeal to the King and his Council to reverse the same if there be Cause. And this was the Course of Relief in the Dutchy of *Normandy*, *viz.* by Appeal to the Duke and his Council; and in the same Manner, it is still observed in the Case of erroneous Decrees or Sentences in those *Islands*, *viz.* To Appeal to the King and his Council.

But

But the Errors in ſuch Decrees or Sentences are not examined by Writ of Error in the *King's-Bench*, for theſe Reaſons, *viz.*

1*ſt*, Becauſe the Courts there, and thoſe here, go not by the ſame Rule, Method, or Order of Law:

And 2*dly*, Becauſe thoſe *Iſlands*, though they are Parcel of the Dominion of the Crown of *England*, yet they are not Parcel of the Realm of *England*, nor indeed ever were; but were anciently Parcel of the Dutchy of *Normandy*, and are thoſe Remains thereof which the Power of the Crown and Kingdom of *France* have not been able to wreſt from the Kingsof *England*.

Whoever deſires to know further, touching the Hiſtory, Laws, Cuſtoms, Religion, and Priviledges of theſe *Iſlands*, may peruſe the Tract, entitled *An Account of the Iſle of Jerſey*, written by Mr. *Philip Falle*, and publiſhed in the Year, 1694.

CHAP.

CHAP. X.

Concerning the Communication of the Laws of England *unto the Kingdom of* Scotland.

BEcauſe this Inquiry will be of Uſe, not only in it ſelf, but alſo as a Parallel Diſcovery of the Tranſmiſſion of the *Engliſh* Laws into *Scotland*, as before is ſhewn they were into *Normandy*; I ſhall in this Chapter purſue and ſolve theſe ſeveral Queries, *viz.*

1*ſt*, What Laws of *Scotland* hold a Congruity and Suitableneſs with thoſe of *England*.

2*dly*, Whether theſe be a ſufficient Ground for us to ſuppoſe, that that Similitude or Congruity began with a Conformation of their Laws to thoſe of *England*. And,

3*dly*, What might be reaſonably judged to be the Means or Reaſon of the Conformation of their Laws unto the Laws of *England*.

1. As to the *Firſt* of theſe Inquiries; It is plain, beyond all Contradiction, that many of the Laws of *Scotland* hold a Congruity and Similitude, and many of them a perfect Identity with the Laws of *England*, at leaſt

as the *Engliſh* Laws ſtood in the Times of *Hen.* II. *Richard* I. King *John*, *Henry* III. and *Edw.* I. And altho' in *Scotland*, Uſe hath always been made of the Civil Law, in point of Direction or Guidance, where their Municipal Laws, either Cuſtomary or Parliamentary failed; yet as to their particular Municipal Laws, we ſhall find a Reſemblance, Parity and Identity, in their Laws with the Laws of *England*, anciently in Uſe; and we need go no further for Evidence hereof, than the *Regiam Majeſtatem*, a Book publiſhed by Mr. *Skeen* in *Scotland*. It would be too long to Inſtance in all the Points that might be produced; and therefore I ſhall ſingle out ſome few, remitting the Reader for his further Satisfaction to the Book it ſelf.

Dower of the Wife to be the Third Part of her Husband's Lands of Inheritance; the Writ to recover the ſame; the Means of Forfeiting thereof by Treaſon or Felony of the Husband, or Adultery of the Wife; are in great Meaſure conformable to the Laws of *England*. *Vide Regiam Majeſtatem*, *Lib.* 2. *cap.* 16, 17. and *Quoniam Attachiamento*, *cap.* 85.

The Excluſion of the Deſcent to the elder Brother by his receiving Homage, which tho' now antiquated in *England*, was anciently received here for Law, as appears by *Glanville*, *Lib.* 7. *cap.* 1. and *Vide Regium Majeſtatem*, *Lib.* 2. *cap.* 22.

The Excluſion of Daughters from Inheritances by a Son: The Deſcent to all the Daugh-

Daughters in Coparcenary for want of Sons; the chief House allotted to the eldest Daughter upon this Partition; the Descent to the Collateral Heirs, for want of Lineal, *&c. Ibid. cap.* 24, 25, 26, 27, 28, 33, 34. But this is now altered in some Things *per Stat. Rob. cap.* 3.

The full Age of Males 21, of Females 14, to be out of Ward in Socage 16. *Ibid. cap.* 42.

That the Custody of Idiots belonged to the King, *Ibid. cap.* 46.

The Custody of Heirs in Socage belong to the next of Kin, to whom the Inheritance can't descend. *Vide Regiam Majest. cap.* 47.

The Son born before Marriage, or *Bastard eigne*, not to be legitimate by the Marriage after, nor was he hereditable by the ancient Laws of *Scotland*, though afterward altered in Use, as it seems, *Regiam Majest. cap.* 51.

The Confiscation of *Bona Usurariorum*, after their Death, conform to the old Law here used. *Ibid. cap.* 54. tho' now antiquated.

The Laws of Escheats, for want of Heirs, or upon Attainder. *Ibid. cap.* 55.

The Acquital of Lands given in *Frank-Marriage*, till the fourth Degree be past, *Ibid. cap.* 57.

Homage, the Manner of making it with the Persons, by, or to whom, as in *England*, *Ibid. cap.* 61, 62, 63, *&c.*

The Relief of an Heir in Knights Service, of full Age, *Regiam Majestatem, cap.* 17.

The Preference of the Sister of the whole Blood, before the Sister of the half Blood. *Quoniam Attachiamento, cap.* 89.

The single Value of the Marriage, and Forfeiture of the double Value, precisely agree with the Statute of *Marlbridge. Ibid. cap.* 91.

The Forfeiture of the Lord's disparageing his Ward in Marriage, agrees with *Magna Charta*, and the Statute of *Marlbridge. Quoniam Attachiamento, cap.* 92.

The Preference of the Lord by Priority to the Custody of the Ward. *Ibid. cap.* 95.

The Punishment of the Ravisher of a Ward, by two Years Imprisonment, *&c.* as here. *Ibid. cap.* 90.

The Jurisdiction of the Lord in *Infangtheof. Ibid. cap.* 100.

Goods confiscate, and Deodands, as here, *Liber De Modo tenendi Cur. Baron. cap.* 62, 63, 64.

And the like of Waifs. *Ibid. cap.* 65.

Widows, not to marry without Consent of the Lord, Statute *Mesei.* 2. *cap.* 23.

Wreck of the Sea, defined precisely as in the Statute *Westm.* 2. *Vide Ibid. cap.* 25.

The Division of the Deceased's Goods, one Third to the Wife, another Third to the Children, and another to the Executor, *&c.* conformable to the ancient Law of *England*, and the Custom of the *North* to this Day. *Lib.* 2. *cap.* 37.

Also the Proceedings to recover Possessions, by *Mortdancester*, *Juris Utrum*, *Assise de Novel disseisin*, *&c.* The Writs and Process

are much the same with those in *England*, and are directed according to *Glanville*, and the old Statutes in the Time of *Edw.* I. and *Hen.* III. *Vide Regiam Majestat. Lib.* 3. *cap.* 27. to 36.

Many more Instances might be given of many of the Municipal Laws of *Scotland*, either precisely the same with those in *England*, or very near, and like to them: Though it is true, they have some particular Laws that hold not that Conformity to ours, which were introduced either by Particular or Common Customs, or by Acts of their Parliaments. But, by what has been said and instanced in, it appears, That like as between the Laws of *England* and *Normandy*, so also between the Laws of *England* and *Scotland*, there was anciently a great Similitude and Likeness.

2. Inquiry. I come therefore to the *Second* Thing I propos'd to inquire into, *viz.* what Evidence there is, That those Laws of *Scotland* were either desumed from the *English* Laws, or from *England*, transmitted thither in such a manner, as that the Laws here in *England* were as it were the Original or prime Exemplar, out of which those parallel or similar Laws of *Scotland* were copied or transcribed into the Body of their Laws; and this appears evident on the following Reasons, *viz.*

1. *First*, For that *Glanville* (which, as has been observed, is the ancientest Collection we have of *English* Laws) seems to be even tran-

tranſcribed in many entire *Capita* of the Laws above-mentioned, and in ſome others where *Glanville* doubts, that Book doubts; and where *Glanville* follows the Practice of the Laws then in Uſe, tho' altered in ſucceeding Times, at leaſt after the Reign of *Edw* I. there the *Regiam Majeſtatem* does accordingly; for Inſtance, *viz.*

Glanville, Lib. 7. *cap.* 1. determine, That a Man can't give away part of the Lands which he held by Hereditary Deſcent unto his Baſtard, without the Conſent of his Heir, and that he may not give all his Purchaſes from his eldeſt Son; and this is alſo declared to be the Law of *Scotland* accordingly, *Regiam Majeſtatem, Lib.* 2. *cap.* 19, 20. Tho' ſince *Glanville's* Time, the Law has been altered in *England.*

Alſo *Glanville, Lib.* 7. *cap.* 1. makes a great Doubt, Whether the ſecond Son, being enfeoffed by the Father, and dies without Iſſue; whether the Land ſhall return to to the Father, or deſcend to his eldeſt, or to his youngeſt Brother; and at laſt gives ſuch a Deciſion as we find almoſt in the ſame Terms and Words recited in the Queſtion and Deciſions laid down in *Regiam Majeſt. Lib.* 2. *cap.* 22.

Again, *Glanville, Lib.* 7. *cap.* 1. makes it a difficult Queſtion in his Time, Whether the eldeſt Son dying in the Life-time of his Father, having Iſſue, the Nephew or the youngeſt Son ſhall inherit; and gives the Arguments *pro & contra*: And *Regiam Ma-*

jestatem, cap. 33. seems to be even a Transcript thereof out of *Glanville.*

And further, the Tract concerning Assises, and the Time of Limitation, the very Form of the Writs, and the Method of the Process, and the Directions touching their Proceedings are but Transcripts of *Glanville,* as appears by comparing *Regiam Majestatem, Lib.* 3. *cap.* 36. with *Glanville, Lib.* 13. *cap.* 32. and the Collector of those Laws of *Scotland* in all the before-mentioned Places, and divers others, quotes *Glanville* as the Pattern at least of those Laws.

2. But *Secondly,* A second Evidence is, because many of the Laws which are mentioned in the *Regiam Majestatem Quoniam Attachiamento,* and other Collections of the *Scotish* Laws, are in Truth very Translations of several Statutes made in *England* in the Times of King *Hen.* III. and King *Edw.* I. For Instance; the Statute of their King *Robert* I. *cap.* 1. touching Alienations to Religious Men, is nothing else but an Enacting of the Statute of *Mortmain,* 13 *E.* 1. *cap.* 13. The Law above-mentioned, touching the Disparagement of Wards, is desumed out of *Magna Charta, cap.* 6. and the Statute of *Merton, cap.* 6. So the Law abovesaid, against Ravishers of Wards, is taken out of *Westm.* 2. *cap.* 35. So the said Law of the double Value of Marriage, is taken out of *Westm.* 1. *cap.* 22. The Law concerning Wreck of the Sea, is but a Transcript out of *Westm.* 1. *cap.* 4. and divers other Instances of like Nature might be given, whereby it may appear,

appear, that very many of those Laws in *Scotland* which are a part of their *Corpus Juris*, bear a Similitude to the Laws of *England*, and were taken as it were out of those Common or Statute Laws here, that obtain'd in the Time of *Edw.* I. and before, but especially such as were in Use or Enacted in the Time of *Edw.* I. and the Laws of *England*, relative to those Matters, were as it were the Original and Exemplar from whence those Similar or Parallel Laws of *Scotland* were derived or borrowed.

Thirdly, I come now to consider the Third Particular, *viz.* By what Means, or by what Reason this Similitude of Laws in *England* and *Scotland* happened, or upon what Account, or how the Laws of *England* at least in many Particulars, or *Capita Legum*, came to be communicated unto *Scotland*, and they seem to be principally these Two, *viz.* *First*, The Vicinity of that Kingdom to this. And *Secondly*, The Subjection of that Kingdom unto the Kings of *England*, at least for some considerable Time. 3. Inquiry.

Touching the former of these; *First*, It is very well known, that *England* and *Scotland* made but one Island, divided not by the Sea or any considerable Arm thereof, but only by the Interjacency of the River *Tweed*, and some Desert Ground, which did not hinder any easie common Access of the People of the one Kingdom to the other: And by this Means, *First*, The Intercourse of Commerce between that Kingdom and this was very frequent and usual, 1.

especially in the *Northern* Counties, and this Intercourse of Commerce brought unto those of *Scotland* an Acquaintance and Familiarity with our *English* Laws and Customs, which in Process of Time were adopted and received gradually into *Scotland*.

Again, *Secondly*, This Vicinity gave often Opportunities of transplanting of Persons of either Nation into the other, especially in those *Northern* Parts, and thereby the *English* transplanted and carried with them the Use of their Native Customs of *England*, and the *Scots* transplanted hither, became acquainted with our Customs, which by occasional Remigrations were gradually translated and became diffus'd and planted in *Scotland*; and it is well known, that upon this Account some of the Nobility and great Men of *Scotland* had Possessions here as well as there: The Earls of *Angus* were not only Noblemen of *Scotland*, but were also Barons of Parliament here, and sate in our *English* Parliaments, as appears by the Summons to Parliament, *Tempore Edvardi Tertii*.

Again, *Thirdly*, The Kings of *Scotland* had Feodal Possessions here; for Instance, The Counties of *Cumberland*, *Northumberland* and *Westmerland*, were anciently held of the Crown of *England* by the Kings of *Scotland*, attended with several Vicissitudes and Changes until the Feast of St. *Michael*, 1237. at which Time *Alexander* King of *Scotland* finally released his Pretensions thereunto, as appears by the Deed thereof enter'd into the Red-Book of the *Exchequer*, and the Parliament

liament Book of 20 E. 1. and in Consideration thereof, *Hen.* III. gave him the Lands of *Penreth* and *Sourby*, *Habend' sibi Heredibus suis Regibus Scotiæ*, and by Vertue of that Special Limitation, they came to *John* the eldest Son of the eldest Daughter of *Alexander* King of *Scotland*, together with that Kingdom; but the Land of *Tindale*, and the Manor of *Huntingdon*, which were likewise given to him and his Heirs, but without that Special Limitation, *Regibus Scotiæ*, fell in Coparcenry, one Moiety thereof to the said *John* King of *Scotland*, as the Issue of the eldest Daughter, and the other Moiety to *Hastings*, who was descended from the younger Daughter of the said *Alexander*: But those Possessions came again to the Crown of *England* by the Forfeiture of King *John* of *Scotland*, who through the Favour of the King of *England* he had Restitution of the Kingdom of *Scotland*, yet never had Restitution of those Possessions he had in *England*, and forfeited and lost by his levying War against the Kingdom of *England* as aforesaid.

And thus I have shewn, that the Vicinity of the Kingdoms of *England* and *Scotland*, and the Consequence thereof, *viz.* Translations of Persons and Families, Intercourse of Trade and Commerce, and Possessions obtained by the Natives of each Kingdom in the other, might be one Means for Communicating our Laws to them.

2. But *Secondly*, There was another Means far more effectual for that End, *viz.* The Superiority and Intereſt that the Kings of *England* obtain'd over the Crown and Kingdom of *Scotland*, whereby it is no Wonder that many of our *Engliſh* Laws were tranſplanted thither by the Power of the *Engliſh* Kings. This Intereſt, Dominion, or Superiority of the Kings of *England* in the Realm of *Scotland* may be conſidered theſe Two ways, *viz.* 1*ſt*, How it ſtood antecedently to the Reign of King *Edw.* I. And 2*dly*, How it ſtood in his Time.

Touching the former of thoſe, I ſhall not trouble my ſelf with collecting Arguments or Authorities relating thereto; he that Deſires to ſee the whole Story thereof, let him conſult *Walſingham*, *ſub Anno* 18 *Edw.* I. as alſo *Rot. Parl.* 12 *R.* 2. *Pars ſecunda*, N° 3. *Rot. Clauſ.* 29 *E.* 1. *M.* 10. *Dorſo*, and the Letter of the Nobility to the *Pope* aſſerting it. *Ibid.*

And this might be one Means, whereby the Laws of *England* in elder Times might in ſome Meaſure be introduced into *Scotland*.

But I rather come to the Times of King *Edw.* I. who was certainly the greateſt refiner of the *Engliſh* Laws, and ſtudiouſly endeavoured to enlarge the Dominions of of the Crown of *England*, ſo to extend and propagate the Laws of *England* into all Parts ſubject to his Dominion. This Prince, beſides the ancient Claim he made to the Superiority of the Crown of *England* over that

that of *Scotland*, did for many Years actually enjoy that Superiority in its full Extent, and the Occasion and Progress thereof was thus, as it is related by *Walsingham*, and consonantly to him appears by the Records of those Times, *viz.* King *Edw.* I. having formerly received the Homage and Fealty of *Alexander* King of *Scots*, as appears *Rot. Claus.* 5 *E.* 1. *M.* 5. *Dorso*, was taken to be *Superior Dominus Scotiæ Regni.*

Alexander dying, left *Margaret* his only Daughter, and she dying without Issue, about 18 *E.* 1. there fell a Controversie touching the Succession of the Crown of *Scotland*, between the King of *Norway* claiming as Tenant by the Curtesy, *Robert de Bruce* descended from the younger Daughter of *David* King of *Scots*, and *John de Baliol* descended from the elder Daughter, with divers other Competitors.

All the Competitors submit their Claim to the Decision of *Edw.* I. King of *England* as *Superior Dominus Regni Scotiæ*, who thereupon pronounced his Sentence for *John de Baliol*, and accordingly put him in Possession of the Kingdom, and required and received his Homage.

The King of *England*, notwithstanding this, kept still the Possession, & *Insignia* of his Superiority; his Court of *King's-Bench* sate actually at *Roxborough* in *Scotland*, *Mich.* 20, 21 *Edw.* I. *coram Rege*, and upon Complaint of Injuries done by the said *John* King of *Scots*, now restor'd to his Kingdom, he summoned him often to answer in his Courts,

Mich.

Mich. 21, 22 *Edw.* I. *Northumb. Scot.* He was ſummoned by the Sheriff of *Northumberland* to anſwer to *Walbeſi* in the King's Court, *Paſ.* 21 *E.* 1. *coram Rege, Rot.* 34. He was in like manner ſummoned to anſwer *John Mazune* in the *King's-Bench* for an Injury done to him, and Judgment given againſt the King of *Scots*, and that Judgment executed.

John King of *Scots*, being not contented with this Subjection, did in the 24th Year of King *Edw.* I. reſign back his Homage to King *Edward*, and bade Defiance to him; wherefore King *Edw.* I. the ſame Year with a powerful Army entred *Scotland*, took the King of *Scots* Priſoner, and the greateſt part of that Kingdom into his Poſſeſſion, and appointed the Earl *Warren* to be *Cuſtos Regni*, *Creſſingham* to be his Treaſurer, and *Ormsby* his Juſtice, and commanded his Judges of his Courts of *England* to iſſue the King of *England*'s Writs into *Scotland*.

And when in the 27th Year of his Reign, the *Pope*, inſtigated by the *French* King, interpos'd in the Behalf of the King of *Scotland*, he and his Nobility reſolutely denied the *Pope*'s Interceſſion and Mediation.

Thus the Kingdom of *Scotland* continued in an actual Subjection to the Crown of *England* for many Years; for *Rot. Clauſ.* 33 *E.* 1. *Membr.* 13. *Dorſo*, and *Rot. Clauſ.* 34 *E.* 1. *Memb.* 3. *Dorſo*; ſeveral Proviſions are made for the better ordering of the Government of *Scotland*.

What

What Proceedings there were herein in the Time of *Edw.* II. and what Capitulations and Stipulations were afterwards made by King *Edw.* III. upon the Marriage of his Sister by *Robert de Bruce*, touching the Relaxation of the *Superius Dominium* of *Scotland*, is not pertinent to what I aim at, which is, to shew how the *Engliſh* Laws that were in Uſe and Force in the Time of *Edw.* I. obtained to be of Force in *Scotland*, which is but this, *viz.*

King *Edward* I. having thus obtained the actual Superiority of the Crown of *Scotland*, from the beginning of his Reign until his 20th Year, and then placing *John de Baliol* in that Kingdom, and yet continuing his Superiority thereof, and keeping his Courts of Juſtice, and exerciſing Dominion and Juriſdiction by his Officers and Miniſters in the very Bowels of that Kingdom, and afterwards upon the Defection of this King *John*, in the 24th of *Edw.* I. taking the whole Kingdom into his actual Adminiſtration, and placing his own Judges and great Officers there, and commanding his Courts of *King's-Bench* (&c.) here, to Iſſue their Proceſs thither, and continuing in the actual Adminiſtration of the Government of that Kingdom during Life: It is no Wonder that thoſe Laws which obtained and were in Uſe in *England*, in and before the Time of this King, were in a great Meaſure tranſlated thither; and poſſibly either by being enacted in that Kingdom, or at leaſt for ſo long Time, put in Uſe

and

and Practice there, many of the Laws in Use and Practice here in *England* were in his Time so rivetted and settled in that Kingdom, that 'tis no Wonder to find they were not shaken or altered by the liberal Concessions made afterwards by King *Edw.* III. upon the Marriage of his Sister; but that they remain Part of the Municipal Laws of that Kingdom to this Day.

And that which renders it more evident, That this was one of the greatest Means of fixing and continuing the Laws of *England* in *Scotland*, is this, *viz.* This very King *Edw.* I. was not only a Martial and Victorious, but also a very Wise and Prudent Prince, and one that very well knew how to use a Victory, as well as obtain it: And therefore knew it was the best Means of keeping those Dominions he had powerfully obtain'd, by substituting and translating his own Laws into the Kingdom which he had thus subdued. Thus he did upon his Conquest of *Wales*; and doubtless thus he did upon his Conquest of *Scotland*, and those Laws which we find there so nearly agreeing with the Laws of *England* used in his Time, especially the Statutes of *Westm.* 1. and *Westm.* 2. are the Monuments and Footsteps of his Wisdom and Prudence.

And, as thus he was a most Wise Prince, and to secure his Acquests, introduced many other Laws of his Native Kingdom into *Scotland*; so he very well knew the Laws of *England* were excellent Laws fitted for the due Administration of Justice to the Constitution

ſtitution of the Governed, and fitted for the Preſervation of the Peace of a Kingdom, and for the Security of a Government: And therefore he was ever ſolicitous, by all prudent and careful Means imaginable, to graft and plant the Laws of *England* in all Places where he might, having before-hand uſed all poſſible Care and Induſtry for Rectifying and Refining the *Engliſh* Laws to their greateſt Perfection.

Again, It ſeems very evident, that the Deſign of King *Edw.* I. was by all Means poſſible to unite the Kingdom of *Scotland* (as he had done the Principality of *Wales*) to the Crown of *England*, ſo that thereby *Britain* might have been one entire Monarchy, including *Scotland* as well as *Wales* and *England* under the ſame Sceptre; and in order to the accompliſhing thereof, there could not have been a better Means than to make the Intereſt of *Scotland* one with *England*, and to knit 'em as it were together in one Communion, which could never have been better done than by eſtabliſhing one Common Law and Rule of Juſtice and Commerce among them; and therefore he did, as Opportunity and Convenience ſerved, tranſlate over to that Kingdom as many of our *Engliſh* Cuſtoms and Laws as within that Compaſs of Time he conveniently could.

And thus I have given an Eſſay of the Reaſons and Means, how and why we find ſo many Laws in *Scotland* parallel to thoſe in *England*, and holding ſo much of Congruity and Likeneſs to them.

And

And the Reaſon why we have but few of their Laws that correſpond with ours of a later Date than *Edw.* I, or at leaſt *Edw.* II. is becauſe ſince the Beginning of *Edw.* III. that Kingdom has been diſtinct, and held little Communion with us till the Union of the two Crowns in the Perſon of King *James* I. (or *rather the happy Union of the two Kingdoms under her preſent Majeſty* Queen Anne) and in ſo great an Interval it muſt needs be, that by the Intervention and Succeſſion of new Laws, much of what was ſo ancient as the Times of *Edw.* I. and *Edw.* II. have received many Alterations: So that it is a great Evidence of the excellency of our *Engliſh* Laws, that there remain to this Day ſo many of them in Force in that Part of *Great Britain* continuing to bear Witneſs, that once that excellent Prince *Edw.* I. exerciſed Dominion and Juriſdiction there.

And thus far of the Communion of the Laws of *England* to *Scotland*, and of the Means whereby it was effected; from whence it may appear, That as in *Wales*, *Ireland* and *Normandy*, ſo alſo in *Scotland*, ſuch Laws which in thoſe Places have a Congruity or Similitude with the Laws of *England*, were derived from the Laws of *England* as from their Fountain and Original, and were not derived from any of thoſe Places to *England*.

CHAP. XI.

Touching the Courſe of Deſcents in England.

AMong the many Preferences that the Laws of *England* have above others, I ſhall ſingle out Two particular Titles which are of Common Uſe, wherein their Preference is very viſible, and the due Conſideration of their Excellence therein, may give us a handſome Indication or Specimen of their Excellencies above other Laws in other Parts or Titles of the ſame alſo. Excellency of our Laws.

Thoſe Titles, or *Capitula Legum*, which I ſhall ſingle out for this Purpoſe, are theſe Two, *viz.* 1*ſt*, The hereditary Tranſmiſſion of Lands from Anceſtor to Heir, and the Certainty thereof: And 2*dly*, The Manner of Trial by Jury, which as it ſtands at this Day ſettled in *England*, together with the Circumſtances and Appendixes thereof, is certainly the beſt Manner of Trial in the World; and I ſhall herein give an Account of the ſucceſſive Progreſs of thoſe *Capitula Legis*, and what Growth they have had in Succeſſion of Time till they arriv'd to that State and Perfection which they have now obtain'd. Two Inſtances.

Firſt then touching Deſcents and hereditary Tranſmiſſions: It ſeems by the Laws Firſt, of Deſcents.

of

of the *Greeks* and *Romans*, that the ſame Rule was held both in relation to Lands and Goods, where they were not otherwiſe diſpoſed of by the Anceſtor, which the *Romans* therefore called *Succeſſio ab inteſtato*; but the Cuſtoms of particular Countries, and eſpecially here in *England*, do put a great Difference, and direct a ſeveral Method in the Tranſmiſſion of Goods or Chattels, and that of the Inheritances of Lands.

Now as to hereditary Tranſmiſſions or Succeſſions, commonly called with us *Deſcents*, I ſhall hold this Order in my Diſcourſe, *viz.*

1. *Firſt*, I ſhall give ſome ſhort Account of the ancient Laws both of the *Jews*, the *Greeks*, and the *Romans*, touching this Matter.

2. *Secondly*, I ſhall obſerve ſome Things wherein it may appear, how the particular Cuſtoms or Municipal Laws of other Countries varied from thoſe Laws, and the Laws here formerly uſed.

3. *Thirdly*, I ſhall give ſome Account of the Rules and Laws of Deſcents or hereditary Tranſmiſſions as they formerly ſtood, and as at this Day they ſtand in *England*, with the ſucceſſive Alterations, that Proceſs of Time, and the Wiſdom of our Anceſtors, and certain Cuſtoms grown up, tacitely, gradually, and ſucceſſively have made therein.

And Firſt, touching the Laws of Succeſſion, as well of Deſcent, of Inheritances of Lands, as alſo of Goods and Chattels,

which among the *Jews* was the ſame in both. Among the *Jews*.

Mr. *Selden*, in his Book *De Succeſſionibus apud Hæbræos*, has given us an excellent Account, as well out of the holy Text as out of the Comments of the *Rabins*, or *Jewiſh* Lawyers, touching the ſame, which you may ſee at large in the 5th, 6th, 7th, 12th and 13th Chapters of that Book; and which, for ſo much thereof as concerns my preſent Purpoſe, I ſhall briefly compriſe under the Eight following Heads, *viz.*

Firſt, That in the Deſcending Line, the Deſcent or Succeſſion was to all the Sons, only the eldeſt Son had a double Portion to any one of the reſt, *viz.* If there were three Sons, the Eſtate was to be divided into four Parts, of which the eldeſt was to have two Fourth Parts, and the other two Sons were to have one Fourth Part each.

Secondly, If the Son died in his Father's Life-time, then the Grandſon, and ſo *in Infinitum*, ſucceeded in the Portion of his Father, as if his Father had been in Poſſeſſion of it, according to the *Jus Repreſentationis* now in Uſe here.

Thirdly, The Daughter did not ſucceed in the Inheritance of the Father as long as there were Sons, or any Deſcendants from Sons in being; but if any of the Sons died in the Life-time of his Father having Daughters, but without Sons, the Daughters ſucceeded in his Part as if he himſelf had been poſſeſſed.

Fourthly, And in case the Father left only Daughters and no Sons, the Daughters equally succeeded to their Father as in Copartnership, without any Prelation or Preference of the eldest Daughter to two Parts, or a double Portion.

Fifthly, But if the Son had purchased an Inheritance and died without Issue, leaving a Father and Brothers, the Inheritance of such Son so dying did not descend to the Brothers, (unless in case of the next Brother's taking to Wife the Deceased's Widow to raise up Children to his deceased Brother) but in such case the Father inherited to such Son entirely.

Sixthly, But if the Father in that Case was dead, then it came to the Brothers, as it were as Heirs to the Father, in the same Manner as if the Father had been actually possess'd thereof; and therefore the Father's other Sons and their Descendants *in Infinitum* succeeded; but yet especially, and without any double Portion to the eldest, because tho' in Truth the Brothers succeeded as it were in Right of Representation from the Father, yet if the Father died before the Son, the Descent was *de Facto* immediately from the Brother deceased to the other Brothers, in which Case their Law gave not a double Portion, and in case the Father had no Sons or Descendants from them, then it descended to all the Sisters.

Seventhly, If the Son died without Issue, and his Father or any Descendants from him were extant, it went not to the Grandfather

father or his other Descendants; but if the Father was dead without Issue, then it descended to the Grandfather, and if he were dead, then it went to his Sons and their Descendants, and for want of them, then to his Daughters or their Descendants, as if the Grandfather himself had been actually possess'd and had died, and so *mutatis mutandis* to the *Proavus*, *Abavus*, *Atavus*, &c. and their Descendants.

Eighthly, But the Inheritance of the Son never resorted to the Mother, or to any of her Ancestors, but both she and they were totally excluded from the Succession.

The double Portion therefore that was *Jus Primogenituræ*, never took Place but in that Person that was the *Primogenitus* of him from whom the Inheritance immediately descended, or him that represented him; as if *A.* had two Sons, *B.* and *C.* and *B.* the eldest had two Sons, *D.* and *E.* and then *B.* died, whereas *B.* should have had a double Portion, *viz.* Two Thirds in case he had survived his Father; but now this double Portion shall be equally divided between *D.* and *E.* and *D.* shall not have Two Thirds of the Two Thirds that descended from *A.* to them. *Vide* Selden, *ut supra*. The double Portion.

Thus much of the Laws or Rules touching Descents among the *Jews*.

Among the *Græcians*, the Laws of Descents in some Sort resemble those of the *Jews*, and in some Things they differed. *Vide* Petit's *Leges Attica*, *Cap.* 1. *Tit.* 6. *De Testamentis* Descents among the *Græcians*.

mentis & Hereditario Jure, where the Text of their Law runs thus, *viz.*

Omnes legitimi Filii Hæreditatem Paternam ex æquo inter se Hæriſcunto, ſi quis inteſtatus moritur relictis Filiabus qui eas in Uxores ducunt hæredes ſunto, ſi nullæ ſuperſint, hi ab inteſtato hæreditatem cernunto: Et primo quidem Fratres defuncti Germani, & legitimi Fratrum Filii hæreditatem ſimul adeunto; ſi nulli Fratres aut Fratrum Filii ſuperſint, iis geniti eadem Lege hæreditatem cernunto: Maſculi autem iis geniti etiam ſi remotiori cognationis ſint Gradu, præferuntor, ſi nulli ſuperſint, Paterni proximi, ad ſobrinorum uſque Filios, Materni defuncti propinqui ſimili Lege Hæreditatem adeunto; ſi e neutra cognatione ſuperſint intra definitum Gradum proximus cognatus Paternus, addito Notho Nothave; ſuperſtite Legitima Filia Nothus Hæreditatem Patris ne adito.

This Law is very obſcure, but the Senſe thereof ſeems to be briefly this, *viz.* That all the Sons equally ſhall inherit to the Father; but if he have no Sons, then the Husbands of the Daughters; and if he have no Children, then his Brothers and their Children; and if none, then his next Kindred on the Part of his Father, prefering the Males before the Females; and if none of the Father's Line, *ad Sobrinorum uſque Filios*, then to deſcend to the Mother's Line. *Vide* Petit's *Gloſs* thereon.

" But with all Reſpect to the Memory of " this great good Man, I ſhall verture to " tranſlate

" tranſlate this Law, whereby it will ap-
" pear, what the true Senſe and Mean-
" ing thereof is, and that it is not ſo dif-
" ficult or obſcure as our Author has re-
" preſented it.

" All the lawful Sons ſhall inherit their
" Father's Eſtate, to be equally divided be-
" tween them: If any Perſon dies Inteſtate,
" leaving only Daughters, their Husbands
" ſhall be his Heirs; but if none of the
" Daughters be living, they (*i. e.* the Huſ-
" bands) ſhall not inherit to the Inteſtate:
" But then in the firſt Place, the Brothers
" of the whole Blood, and ſuch Brothers
" Children, ſhall inherit together, (*i. e.* the
" Children, *jure repreſentationis*) and if there
" are no Brothers or Brothers Children
" living, then their Deſcendants (if they
" leave any) ſhall inherit by the ſame Law
" of equal Diſtribution; yet ſtill the Males
" and their Deſcendants, tho' of the more
" remote Degree of Kindred, are to be pre-
" ferr'd; but if none of the Father's Blood
" be living, of any nearer Degree than
" that of Father's Brother's Children, then
" the Inheritance ſhall deſcend to thoſe of
" the Mother's Blood, having a like Regard
" to the Law of Diſtributions, and the
" Mother's Brother's Children; but if none
" of either Line within the Degrees before
" ſpecified be living, then it ſhall deſcend
" to any of the Father's Blood tho' an illegi-
" timate Son or Daughter; but if a legitimate
" Daughter were living, no Baſtard ſhall

" succeed in the Inheritance of the Father.
" *Vide* Petit's *Gloss in hanc Legem.*

Descents among the *Romans.*

Among the *Romans* it appears, that the Laws of Successions or Discents did successively vary, for the Laws of the Twelve Tables did exclude the Females from inheriting, and had many other Streightnesses and Hardships which were successively remedied; First, by the Emperor *Claudius*, and after him by *Adrian*, in his *Senatus Consultus Tertullianus*, and after him by *Justinian* in his Third Institutes, *Tit. De Hæreditatibus quæ ab intestato deferuntur*, and the Two ensuing Titles. And again, all this was further explained and settled by the *Novel* Constitutions of the said *Justinian*, stiled the *Authenticæ Novellæ*, *cap.* 18. *De Hæreditatibus ab intestato venientibus & agnatorum Jure sublato.* Therefore omitting the large Inquiry into the successive Changes of the *Roman* Law in this particular, I shall only set down how, according to that Constitution, the *Roman* Law stands settled therein.

Descents or Successions from any Person are of Three Kinds, *viz.* 1*st*, *In the Descending Line.* 2*dly*, *The Ascending Line.* 3*dly*, *The Collateral Line*; and this latter is either *in Adgnatos a Parte Patris*, or *in Cognatos a Parte Matris.*

1. Descending Line.

I. *In the Descending Line*, These Rules are by the *Roman* Law directed, *viz.*

1. The Descending Line, (whether Male or Female, whether immediate or remote) takes Place, and prevents the Descent or Suc-

Succeſſion Aſcending or Collateral *in infinitum.*

2. The remote Deſcents of the Deſcending Line ſucceed *in Stirpem, i. e.* in that Right which his Parent ſhould have had.

3. This Deſcent or Succeſſion is equal in all the Daughters, all the Sons, and all the Sons and Daughters, without preferring the Male before the Female; ſo that if the common Anceſtor had three Sons and three Daughters, each of them had a ſixth Part; and if one of them had died in the Life of the Father, having three Sons and three Daughters, the ſixth Part that belonged to that Party ſhould have been divided equally between his or her ſix Children, and ſo *in infinitum* in the Deſcending Line.

II. *In the Aſcending Line*, there are theſe two Rules, *viz.* 2. Aſcending Line.

1. If the Son dies without Iſſue, or any deſcending from him, having a Father and a Mother living, both of them ſhall equally ſucceed to the Son, and prevent all others of the *Collateral Line* except Brothers and Siſters, and if only a Father, or only a Mother, he or ſhe ſhall ſucceed alone.

2. But if the Deceaſed leaves a Father and a Mother, with a Brother and a Siſter, *ex utriſque Parentibus conjuncti*, they all Four ſhall equally ſucceed to the Son by equal Parts without Preference of the Males.

III. *In the Collateral Line*, (*i. e.* where the Perſon dies without Father or Mother, 3. Collateral Son Line.

Son or Daughter, or any descending from them in the Right Line) the Rules are these, *viz.*

1. The Brothers and Sisters, *ex utrisque Parentibus conjuncti*, and the immediate Children of them, shall succeed equally without Preference of either Sex, and the Children from them shall succeed *in stirpes*; as if there be a Brother and Sister, and the Sister dies in the Life of the Descendant leaving one or more Children, all such Children shall succeed in the Moiety that should have come to their deceased Mother, had she survived.

2. But if there be no Brothers or Sisters, *ex utrisque Parentibus conjuncti*, nor any of their immediate Children, then the Brothers and Sisters of the half Blood and their immediate Children shall succeed *in Stirpes* to the Deceased without any Prerogative to the Male.

3. But if there be no Brothers or Sisters of the whole or half Blood, nor any of their immediate Children (for the Grandchildren are not provided for by the Law) then the next Kindred are called to the Inheritance.

(*But by our Author's Leave, I think the Grandchildren are impliedly provided for, as they succeed their Father or Mother* Jure representationis.)

4. And if the next Kindred be in an equal Degree, whether on the Part of the Father as *Adgnati*, or on the Part of the Mother as *Cognati*, then they are equally called to the

the Inheritance, and ſucceeded *in Capita*, and not *in Stirpes*.

Thus far of the ſettled Laws of the *Jews*, *Greeks*, and *Romans*, but the Particular or Municipal Laws and Cuſtoms of almoſt every Country derogate from thoſe Laws, and direct Succeſſions in a much different Way. For Inſtance.

By the Cuſtoms of *Lombardy*, according to which the Rules of the Feuds, both in their Deſcents and in other Things, are much directed; their Decents are in a much different Manner, *viz.* Laws of *Lombardy*.

Leges Feudarum, *Lib.* 1. *Tit.* 1. If a Feud be granted to one Brother who dies without Iſſue, it deſcends not to his other Brother unleſs it be ſpecially provided for in the firſt Infeudation: If the Donee dies, having Iſſue Sons and Daughters, it deſcends only to the Sons; whereas by the *Roman* Law it deſcends to both: The Brother ſucceeds not to the Brother unleſs ſpecially provided for, *& Ibid. Tit.* 50. The Aſcendants ſucceed not, but only the Deſcendants, neither does a Daughter ſucceed *niſi ex Pacto*, *vel niſi ſit Feodum Fœmineum*. Of Feuds.

If we come nearer Home to the Laws of *Normandy*, Lands there are of Two Kinds, *viz.* Partible, and not Partible; the Lands that are partible, are Valvaſories, Burgages, and ſuch like, which are much of the Nature of our Socage Lands; theſe deſcend to all the Sons, or to all the Daughters: Lands not partible, are Fiefs and Dignities, they Deſcents in *Normandy*.

they descend to the eldest Son, and not to all the Sons; but if there be no Sons, then to all the Daughters, and become partible.

The Rules and Directions of their Descents are as follow, *viz.*

1. For want of Sons or Nephews, it descends to the Daughters; if there be no Sons or Daughters, or Descendants from them, it goes to Brothers, and for want of Brothers, to Sisters, (observing as before the Difference between Lands partible and not partible) and accordingly the Descent runs to the Posterity of Brothers to the seventh Degree; and if there be no Brothers nor Sisters, nor any Descendants from them within the seventh Degree, it descends to the Father, and if the Father be dead, then to the Uncles and Aunts and their Posterity, (as above is said in the Case of Brothers and Sisters) and if there be none, then to the Grandfather.

So that according to their Law, the Father is *postponed* to the Brother and Sister, and their Issues, but is preferred before the Uncle: Tho' according to the *Jewish* Law, the Father is preferred before the Brother; by the *Roman* Law, he succeeds together equally with the Brother; but by the *English* Law, the Father cannot take from his Son by an immediate Descent, *but may take as Heir to his Brother, who was Heir to his Son by Collateral Descent.*

2. If

2. If Lands descended from the Part of the Father, they could never resort by a Descent to the Line of the Mother; but in case of Purchases by the Son who died without Issue, for want of Heirs of the Part of the Father, it descended to the Heirs of the Part of the Mother according to the Law of *England.*

3 The Son of the eldest Son dying in the Life of the Father, is preferred before a younger Son surviving his Father as the Law stands here now settled, tho' it had some Interruption, 4 *Johannis.*

4. On Equality of Degrees in *Collateral Descents,* the Male Line is preferred before the Female.

5. Altho' by the Civil Law, *Fratres ex utroque Parente conjuncti præferuntur Fratribus consanguineis tantum vel uterinis*; yet it should seem by the *Coutumier* of *Normandy, Fratres consanguinei ei ex eodem Patre sed diversa Matre,* shall take by Descent together with the Brothers, *ex utroque conjuncti,* upon the Death of any such Brothers. But *Quære* hereof, for this seems a Mistake; for, as I take it, the half Blood hinders the Descent between Brothers and Sisters by their Laws as well as ours.

6. Leprosy was amongst them an Impediment of Succession, but then it seems it ought to be first solemnly adjudged so by the Sentence of the Church.

Upon all this, and much more that might be observed upon the Customs of several Countries, it appears, That the Rules of Suc-

Successions, or hereditary Transmissions, have been various in several Countries according to their various Laws, Customs, and Usages.

And now, after this brief Survey of the Laws and Customs of other Countries, I come to the Laws and Usages of *England* in relation to Descents, and the Growth that those Customs successively have had, and whereunto they are now arrived.

Descents in *England.*

First, Touching hereditary Successions: It seems, that according to the ancient *British* Laws, the eldest Son inherited their Earldoms and Baronies; for they had great Dignities and Jurisdictions annex'd to them, and were in Nature of Principalities, but that their ordinary Freeholds descended to all their Sons; and this Custom they carried with them into *Wales* whither they were driven. This appears by *Statutum Walliæ*, 12 E. 1. and which runs thus, *viz.*

Among the *Welsh.* Statute 12 *Ed.* 1.

Aliter usitatum est in Wallia quam in Anglia quoad Successionem hæreditatis; eo quod hæreditas partibilis est inter hæredes Masculos, & a tempore cujus non extiterit Memoria partibilis extitit. Dominus Rex non vult quod consuetudo illa abrogetur; sed quod hæreditates remaneant partibiles inter consimiles hæredes sicut esse Consueverunt; & fiat partitio illius sicut fieri consuevit. Hoc excepto quod Bastardi non habeant de cætero hæreditates & etiam quod non habeant purpartes, cum legitimis nec sine legitimis.

Where-

Whereupon Three Things are obſervable, *viz.* 1*ſt*, That at this Time the hereditary Succeſſion of the eldeſt Son was then known to be the common and uſual Law in *England*. 2*dly*, That the Succeſſion of all the Sons was the ancient cuſtomary Law among the *Britiſh* in *Wales*, which by this Statute was continued to them. 3*dly*, That before this Time, Baſtards were admitted to inherit in *Wales* as well as the Legitimate Children, which Cuſtom is thereby abrogated; and although we have but few Evidences touching the *Britiſh* Laws before their Expulſion hence into *Wales*, yet this Uſage in *Wales* ſeems ſufficiently to evidence this to have been the ancient *Britiſh* Law.

Secondly, As to the Times of the *Saxons* and *Danes*, their Laws collected by *Brompton* and Mr. *Lambart*, ſpeak not much concerning the Courſe of Deſcents; yet it ſeems that commonly Deſcents of their ordinary Lands at leaſt, except Baronies and Royal Inheritances, deſcended alſo to all the Sons: For amongſt the Laws of King *Canutus*, in Mr. *Lambard* is this Law, *viz.* N° 68. *Sive quis incuria ſive Morte repentina fuerit inteſtato mortuus, Dominus tamen nullam rerum ſuarum Partem (præter eam quæ jure debetur Hereoti nomine) Sibi aſſumito. Verum eas Judicio ſuo Uxori,* Liberis *& cognatione proximis juſte (pro ſuo cuique jure) diſtribuito.*

Upon which Law, we may obſerve theſe five Things, *viz.*

1*ſt*, That

1*ſt*, That the Wife had a Share, as well of the Lands for her Dower, as of the Goods.

2*dly*, That in reference to hereditary Succeſſions, there then ſeem'd to be little Difference between Lands and Goods, for this Law makes no Diſtinction.

3*dly*, That there was a kind of ſettled Right of Succeſſion, with reference to Proximity and Remoteneſs of Blood, or Kin, *Et cognatione proximis pro ſuo cuique jure.*

4*thly*, That in reference to Children, they all ſeem'd to ſucceed alike, without any Diſtinction between Males and Females.

5*thly*, That yet the Anceſtor might diſpoſe of by his Will as well Lands as Goods, which Uſage ſeems to have obtained here unto the Time of *Hen.* II. as will appear hereafter. *Vide Glanville.*

Thirdly, It ſeems that, until the Conqueſt, the Deſcent of Lands was at leaſt to all the Sons alike, and for ought appears to all the Daughters alſo, and that there was no Difference in the hereditary Tranſmiſſion of Lands and Goods, at leaſt in reference to the Children: This appears by the Laws of King *Edward the Confeſſor*, confirm'd by King *William* I. and recited in Mr. *Lambart*, *Folio* 167. as alſo by Mr. *Selden* in his Notes upon *Eadmerus*, viz. *Lege* 36 *Tit. De Inteſtatorum Bonis*; *Pag.* 184. *Si quis inteſtatus obierit Liberi ejus Hæreditatem æqualiter divident.*

But this equal Diviſion of Inheritances among all the Children was found to be very inconvenient: For,

1*ſt*, It weakened the Strength of the Kingdom, for by frequent parcelling and ſubdividing of Inheritances, in Proceſs of Time they became ſo divided and crumbled, that there were few Perſons of able Eſtates left to undergo publick Charges and Offices.

2*dly*, It did by Degrees bring the Inhabitants to a low kind of Country living, and Families were broken; and the younger Sons, which had they not had thoſe little Parcels of Land to apply themſelves to, would have betaken themſelves to Trades, or to Civil or Military, or Eccleſiaſtical Employments, neglecting thoſe Opportunities, wholly apply'd themſelves to thoſe ſmall Diviſions of Lands, whereby they neglected the Opportunities of greater Advantage of enriching themſelves and the Kingdom.

And therefore King *William* I. having by his Acceſſion to the Crown gotten into his Hands the Poſſeſſions and Demeaſns of the Crown, and alſo very many and great Poſſeſſions of thoſe that oppos'd him, or adhered to *Harold*, diſpoſed of thoſe Lands or great Part of them to his Countrymen, and others that adhered to him, and reſerved certain honorary Tenures, either by Baronage, or in Knights-Service or Grand Serjeancy, for the Defence of the Kingdom, and poſſibly alſo, even at the Deſire of many of the Owners, changed their former Tenures into Knights-Service, which Introduction of new Tenures was neverthe-

leſs

leſs not done without Conſent of Parliament; as appears by the additional Laws before mentioned, that King *William* made by Advice of Parliament, mentioned by Mr. *Selden* in his Notes on *Eadmerus*, *Page* 191. amongſt which this was one, *viz.*

Statuimus etiam & firmiter præcipimus ut omnes Comites Barones Milites & Servientes & univerſi liberi Homines totius Regni noſtri habeant & teneant ſe ſemper in Armis & in Equis ut decet & oportet, & quod ſint ſemper prompti & bene parati ad Servitium ſuum integrum nobis explendendum & peragendum, cum ſemper opus fuerit ſecundum quod nobis de Feodis debent & tenentur Tenementis ſuis de Jure facere & ſicut illis ſtatuimus per Commune Concilium totius Regni noſtri, Et illis dedimus & conceſſimus in Feodo Jure hæreditario.——

Whereby it appears, that there were Two Kinds of Military Proviſions; one that was ſet upon all Freeholds by common Conſent of Parliament, and which was uſually called *Aſſiſa Armorum*; and another that was Conventional and by Tenure, upon the Infeudation of the Tenant, and which was uſually called *Knights Service*, and ſometimes Royal, ſometimes Foreign Service, and ſometimes *Servitium Loricæ*.

And hence it came to paſs, that not only by the Cuſtoms of *Normandy*, but alſo according to the Cuſtoms of other Countries, thoſe honorary Fees, or Infeudations, became deſcendible to the Eldeſt, and not to

all the Males. And hence also it is, that in *Kent*, where the Custom of all the Males taking by Descent generally prevails, and that pretend a Concession of all their Customs by the Conqueror, to obtain a Submission to his Government, according to that Romantick Story of their *Moving Wood*: But even in *Kent* it self, those ancient Tenements or Fees that are there held anciently by Knights Service, are descendible to the Eldest Son; as Mr. *Lambard* has observed to my Hands in his *Perambulation*, *Page* 533, 553. out of 9 *H.* 3. *Fitz. Prescription* 63. 26 *H.* 8. 5. and the Statute of 31 *H.* 8. *cap.* 3. And yet even in *Kent*, if Gavelkind Lands escheat, or come to the Crown by Attainder or Dissolution of Monasteries, and be granted to be held by Knights Service, or *per Baroniam*, the Customary Descent is not changed, neither can it be but by Act of Parliament, for it is a Custom fix'd to the Land.

But those honorary Infeudations made in ancient Times, especially shortly after the Conquest, did silently and suddenly assume the Rule of Descents to the Eldest, and accordingly held it; and so altho' possibly there were no Acts of Parliament of those Elder Times, at least none that are now known of, for altering the ancient Course of Descents from all the Sons to the Eldest, yet the Use of the Neighbouring Country might introduce the same Usage here as to those honorary Possessions.

And because those honorary Infeudations were many, and scattered almost through all the Kingdom, in a little Time they introduced a Parity in the Succession of Lands of other Tenures, as Socages, Valvasories, &c. So that without Question, by little and little, almost generally in all Counties of *England* (except *Kent*, who were most tenacious of their old Customs in which they gloried, and some particular Feuds and Places where a contrary Usage prevailed), the generalty of Descents or Successions, by little and little, as well of Socage Lands as Knights Service, went to the eldest Son, according to the Declaration of King *Edw.* I. in the Statute of *Wales* above-mentioned, as will more fully appear by what follows.

In the Time of *Hen.* I. as we find by his 70th Law, it seems that the whole Land did not descend to the eldest Son, but begun to look a little that Way, *viz. Primum Patris Feudum, primogenitus Filius habeat.* And as to *Collateral Descents*, that Law determins thus: *Si quis sine Liberis decesserit Pater aut Mater ejus in hæreditatem succedat vel Frater vel Soror si Pater & Mater desint, si nec hos, habeat Soror Patris vel Matris, & deinceps in Quintum geniculum; qui cum propinquiores in parentela sint hæreditario jure succedant; & dum Virilis sexus extiterit & hæreditas ab inde sit, Fœminea non hæreditetur.*

Vide Atte. Chap. 7. and Lambard, ut supra.

By

By this Law it seems to appear;

1. The eldest Son, tho' he had *Jus primogenituræ*, the principal Fee of his Father's Land, yet he had not all the Land.

2. That for want of Children, the Father or Mother inherited before the Brother or Sister.

3. That for want of Children, and Father, Mother, Brother, and Sister, the Land descended to the Uncles and Aunts to the fifth Generation.

4. That in Successions Collateral, Proximity of Blood was preferred.

5. That the Male was preferred before the Female, *i. e.* The Father's Line was preferred before the Mother's, unless the Land descended from the Mother, and then the Mother's Line was preferred.

How this Law was observed in the Interval between *Hen.* I. and *Hen.* II. we can give no Account of; but the next Period that we come to is, the Time of *Hen.* II. wherein *Glanville* gives us an Account how the Law stood at that Time: *Vide Glanville, Lib.* 7. Wherein notwithstanding it will appear, that there was some Uncertainty and Unsettledness in the Business of Descents or Hereditary Successions, tho' it was much better polished than formerly, the Rules then of Succession were either in reference to Goods, or Lands. 1st, As to Goods, one Third Part thereof went to the Wife, another Third Part went to the Children, and the other Third was left to the Disposition

of the Testator; but if he had no Wife, then a Moiety went to the Children, and the other Moiety was at the Deceased's Disposal. And the like Rule if he had left a Wife, but no Children, *Glanv. lib. 7. cap. 5. & Vide lib. 2. cap. 29.*

But as to the Succession of Lands, the Rules are these:

First, If the Lands were Knights Service, they generally went to the eldest Son; and in case of no Sons, then to all the Daughters; and in case of no Children, then to the eldest Brother.

Secondly, If the Lands were Socage, they descended to all the Sons to be divided; *Si fuerit Soccagium & id antiquitus divisum*; only the Chief House was to be allotted to the Purparty of the Eldest, and a Compensation made to the rest in lieu thereof: *Si vero non fuerit antiquitus divisum, tunc Primogenitus secundum quorundam Consuetudinem totam Hereditatem obtinebit, secundum autem quorundam Consuetudinem postnatus Filius Hæres est. Glanville, lib. 7. cap. 3.* So that altho' Custom directed the Descent variously, either to the eldest or youngest, or to all the Sons, yet it seems that at this Time, *Jus Commune*, or Common Right, spoke for the eldest Son to be Heir, no Custom intervening to the contrary.

Thirdly, As the Son or Daughter, so their Children *in infinitum*, are preferred in the Descent before the Collateral Line, or Uncles.

Fourthly,

Fourthly, But if a Man had two Sons, and the eldeſt Son died in the Life-time of his Father, having Iſſue a Son or Daughter, and then the Father dies; it was then controverted, whether the Son or Nephew ſhould ſucceed to the Father, tho' the better Opinion ſeems to be for the Nephew, *Glanvil. lib. 7. cap. 3.*

Fifthly, A Baſtard could not inherit, *Ibid. cap.* 13, or 17. And altho' by the Canon or Civil Law, if *A.* have a Son born of *B.* before Marriage, and after *A.* marries *B.* this Son ſhall be legitimate and heritable; yet according to the Laws of *England* then, and ever ſince uſed, he was not heritable, *Glanvil. lib. 7. cap.* 15.

Sixthly, In caſe the Purchaſer died without Iſſue, the Land deſcended to the Brothers; and for want of Brothers, to the Siſters; and for want of them, to the Children of the Brothers or Siſters; and for want of them, to the Uncles; and ſo onward according to the Rules of Deſcents at this Day; and the Father or Mother were not to inherit to the Son, but the Brothers or Uncles, and their Children. *Ibid. cap.* 1. § 4.

And it ſeems, That in all Things elſe, the Rules of Deſcents in reference to the Collateral Line were much the ſame as now; as namely, That if Lands deſcended of the Part of the Father, it ſhould not reſort to the Part of the Mother, or *è converſo*; but in the Caſe of Purchaſers, for want of

Heirs of the Part of the Father, it resorted to the Line of the Mother, and the nearer and more worthy of Blood were preferred: So that if there were any of the Part of the Father, tho' never so far distant, it hindred the Descent to the Line of the Mother, though much nearer.

But in those Times it seems there were two Impediments of Descents or hereditary Successions which do not now obtain, *viz.*

First, Leprosy, if so adjudged by Sentence of the Church: This indeed I find not in *Glanville*; but I find it pleaded and allowed in the Time of King *John*, and thereupon the Land was adjudged from the Leprous Brother to the Sister. *Pasch.* 4 *Johannis*.

Secondly, There was another Curiosity in Law, and it was wonderful to see how much and how long it prevail'd; for we find it in Use in *Glanville*, who wrote *Temp. Hen.* II. in *Bracton Temp. Hen.* III. in *Fleta Temp. Edw.* I. and in the broken Year of 13 *E.* 1. *Fitzh. Avowry* 235. *Nemo potest esse Tenens & Dominus, & Homagium repellit Perquisitum*: And therefore if there had been three Brothers, and the eldest Brother had enfeoff'd the second, reserving Homage, and had received Homage, and then the second had died without Issue, the Land should have descended to the youngest Brother and not to the eldest Brother, *Quia Homagium repellit perquisitum*, as 'tis here said, for he could not pay Homage to himself.

Vide

Vide for this, *Bracton, Lib.* 2. *cap.* 30. *Glanvil. Lib.* 7. *cap.* 1. *Fleta, Lib.* 6. *cap.* 1.

But at this Day the Law is altered, and so it has been for ought I can find ever since 13 *E.* 1. Indeed, it is antiquated rather than altered, and the Fancy upon which it was grounded has appear'd trivial; for if the eldest Son enfeoff the second, reserving Homage, and that Homage paid, and then the second Son dies without Issue, it will descend to the Eldest as Heir, and the Seigniory is extinct. It might indeed have had some Colour of Reason to have examined, whether he might not have waved the Descent, in case his Services had been more beneficial than the Land: But there could be little Reason from thence to exclude him from the Succession. I shall mention no more of this Impediment, nor of that of Leprosy, for that they both are vanished and antiquated long since; and, as the Law now is, neither of these are any Impediment of Descents.

And now passing over the Time of King *John* and *Richard* I. because I find nothing of Moment therein on this Head, unless the Usurpation of King *John* upon his eldest Brother's Son, which he would fain have justified, by introducing a Law of preferring the younger Son before the Nephew descended from the elder Brother: But this Pretension could no way justifie his Usurpation, as has been already shewn in the Time of *Hen.* II.

Next, I come to the Time of *Hen.* III. in whose Time the Tractate of *Bracton* was written, and thereby in *Lib.* 2. *cap.* 30, & 31. and *Lib.* 5. *cap.* 1. it appears, That there is so little Variance as to Point of Descents between the Law as it was taken when *Bracton* wrote, and the Law as afterwards taken in *Edw.* I.'s Time, when *Britton* and *Fleta* wrote, that there is very little Difference between them, as may easily appear by comparing *Bracton ubi supra*, & *Fleta, Lib.* 5. *cap.* 1. in *Lib.* 6. *cap.* 1, 2. that the latter seem to be only Transcripts or Abstracts of the former. Wherefore I shall set down the Substance of what both say, and thereby it will appear, that the Rules of Descents in *Hen.* III. and *Edw.* I.'s Time were very much one.

First, then this Time the Law seems to be unquestionably settled, that the eldest Son was of Common Right Heir, not only in Cases of Knight Service Lands, but also of Socage Lands, (unless there were a special Custom to the contrary, as in *Kent* and some other Places) and so that Point of the Common Law was fully settled.

Secondly, That all the Descendants *in infinitum*, from any Person that had been Heir, if living, were inheritable, *Jure representationis*; as the Descendants of the Son, of the Brother, of the Uncle, &c. And also

Thirdly, That the eldest Son dying in the Life-time of the Father, his Son or Issue

was

was to have the Preference as Heir to the Father before the younger Brother, and so the Doubt in *Glanville's* Time was settled, *Glanvil. Lib. 7. cap. 3. Cum quis autem moriatur habens Filium postnatum, & ex primogenito Filio præmortuo Nepotem, Magna quidem furit dubitatio solet esse uter illorum preferendus sit alii in illa Successione, scilicet, utrum Filius aut Nepos?*

Fourthly, The Father, or Grandfather, could not by Law inherit immediately to the Son.

Fifthly, Leprosy. Though it were an Exception to a Plaintiff, because he ought not to converse in the Courts of Law, as *Bracton, Lib. 5. cap. 20.* yet we no where find it to be an Impediment of a Descent.

So that upon the whole Matter, for any Thing I can observe in them, the Rules of Descents then stood settled in all Points as they are at this Day, except some few Matters (which yet soon after settled as they now stand), *viz.*

First, That Impediment or Hindrance of a Descent from him, that did Homage to him that received it, seems to have been yet in Use at least till 13 *E.* 1. and in *Fleta's* Time, for he puts the Case and admits it.

Secondly, Whereas both *Bracton* and *Fleta* agree, that half Blood to him that is a Purchaser is an Impediment of a Descent; yet in the Case of a Descent from the Common Ancestor, half Blood is no Impediment,

ment. As for Instance; *A.* has Issue *B.* a Son and *C.* a Daughter by one Venter, and *D.* a Son by another Venter: If *B.* purchases in Fee and dies without Issue, it shall descend to the Sister, and not to the Brother of the half Blood; but if the Land had descended from *A.* to *B.* and he had entred and died without Issue, it was a Doubt in *Bracton* and *Britton*'s Time, whether it should go to the younger Son, or to the Daughter? But the Law is since settled, that in both Cases it descends to the Daughter, *Et seisina facit Stipitem & primum Gradum. Et possessio Fratris de Feodo simplici facit Sororem esse hæredem.*

Thus upon the whole it seems, That abating those small and inconsiderable Variances, the States and Rules of Descents as they stood in the Time of *Hen.* III. or at least in the Time of *Edw.* I. were reduced to their full Complement and Perfection, and vary nothing considerably from what they are at this Day, and have continued ever since that Time.

I shall therefore set down the State and Rule of Descents in Fee-Simple as it stands at this Day, without meddling with particular Limitations of Entails of Estates, which vary the Course of Descents in some Cases from the Common Rules of Descents or hereditary Successions; and herein we shall see what the Law has been and continued touching the same ever since *Bracton*'s Time, who wrote in the Time of *Hen.* III. now above 400 Years since, and by that we shall

ſhall ſee what Alterations the Succeſſion of Time has made therein.

And now to give a ſhort Scheme of the Rules of Deſcents, or hereditary Succeſſions, of the Lands of Subjects as the Law ſtands at this Day, and has ſtood for above four hundred Years paſt, *viz.*

All poſſible hereditary Succeſſions may be diſtinguiſhed into theſe 3 Kinds, *viz.* either,

1*ſt*, *In the Deſcending Line*, as from Father to Son or Daughter, Nephew or Niece, *i.e.* Grandſon or Grand-daughter. Or,

2*dly*, *In the Collateral Line*, as from Brother to Brother or Siſter, and ſo to Brother and Siſters Children. Or,

3*dly*, *In an Aſcending Line*, either direct, as from Son to Father or Grandfather, (which is not admitted by the Law of *England*) or in the tranſverſal Line, as to the Uncle or Aunt, Great-Uncle or Great-Aunt, *&c.* And becauſe this Line is again divided into the Line of the Father, or the Line of the Mother, this tranſverſe aſcending Succeſſion is either in the Line of the Father, Grandfather, *&c.* on the Blood of the Father; or in the Line of the Mother, Grandmother, *&c.* on the Blood of the Mother: The former are called *Agnati*, the latter *Cognati*: I ſhall therefore ſet down a Scheme of Pedigrees as high as Great-Grandfather and Great-Grandmothers Grandſires, and as low as Great-Gandchild; which nevertheleſs will be applicable to more remote Succeſſions with a little Variation, and will explain the whole Nature of Deſcents or hereditary Succeſſions.

The

The *PATERNAL* Line.

Trinepos, or Great-Grandfather's Great-Grandfather.

Abavus, or Great-Grandfather's Grandfather.

Avus, or Great-Grandfather's Father.

Patruus, or Father's Brother.

Frater, his Brother.

Nepos, Nephew.

Neptis, Niece.

Proavus, or Great-Grandfather.

Patruus Magnus, Great-Uncle.

Amita, or Aunt.

Soror, his Sister.

Nepos, Nephew.

Neptis, Niece.

Abavus, or Great-Grandfather's Father.

Proamita Magna, Great Great-Aunt.

Amita Magna, Great-Aunt.

Pater, or FATHER.

Filius, his eldest Son.

Nepos, or Grandson.

Neptis, Granddaughter.

The *MATERNAL* Line.

Trivavus, or Great-Grandfather's Great-Grandmother.

Atavus, or Great-Grandfather's Grandmother.

Avia, or Grandmother.

Proamita Magna, Great Great-Aunt.

Amita Magna, Great-Aunt.

Mater, or MOTHER.

Filius, his eldest Son.

Nepos, or Grandson.

Neptis, Granddaughter.

Abavus, or Great-Grandmothers Grandmother.

Proavia, or Gr. Grandmother.

Proamita Magna, Great-Great-Aunt.

Amita Magna, Great-Aunt.

Soror, her Sister.

Nepos, Nephew.

Neptis, Niece.

Atavus, or Great-Grandmothers Grandmother.

Proavia, or Gr. Grandmother.

Proamita Magna, Great-Great-Aunt.

Amita Magna, Great-Aunt.

Consobrinus, A Mothers Sisters Son.

Consobrina, A Mothers Sisters Daughter.

Consobrinus, A Mothers Brother's Son.

Consobrina, A Mothers Brother's Daughter.

Proavunculus Magnus, Gr. Great-Uncle.

Avunculus Magnus, Great-Uncle.

Avunculus, Mothers Brother.

Matertera, Mothers Sister.

Matertera Magna, Great-Aunt.

Note, The Descendents from all these Six in the next Degree if Male, are called *Pronepos*; if Female, *Proneptis*.

i. e. Great-Grandson, or Great-Granddaughter.

This Pedigree, with its Application, will give a plain Account of all Hereditary Successions under their several Cases and Limitations, as will appear by the following Rules, taking our Mark or *Epocha* from the FATHER and MOTHER.

But first, I shall premise certain general Rules, which will direct us much in the Course of Descents, as they stand here in *England*: (*Viz.*)

First, In Descents, the Law prefers the worthiest of Blood: As, 1. Rule.

1*st*, In all Descents immediate, the Male is preferred before the Female, whether in Successions Descending, Ascending, or Collateral: Therefore in Descents, the Son inherits and excludes the Daughter, the Brother is preferred before the Sister, the Uncle before the Aunt.

2*dly*, In all Descents immediate, the Descendants from Males are to be preferred before the Descendants from Females: And hence it is, That the Daughter of the eldest Son is preferred in Descents from the Father before the Son of the younger Son; and the Daughter of the eldest Brother, or Uncle, is preferred before the Son of the younger; and the Uncle, nay, the Great-Uncle, *i. e.* the Grandfather's Brother, shall inherit before the Uncle of the Mothers Side.

Secondly, In Descents, the next of Blood is preferred before the more remote, tho' equally or more worthy. And hence it is, 2. Rule.

1*st*, The

1*ſt*, The Siſter of the whole Blood is preferred in Deſcents before the Brother of the half Blood, becauſe ſhe is more ſtrictly joined to the Brother of the whole Blood (*viz.* by Father and by Mother) than the half Brother, though otherwiſe he is the more worthy.

2*dly*, Becauſe the Son or Daughter being nearer than the Brother, and the Brother or Siſter than the Uncle, the Son or Daughter ſhall inherit before the Brother or Siſter, and they before the Uncle.

3*dly*, That yet the Father or Grandfather, or Mother or Grandmother, in a direct aſcending Line, ſhall never ſucceed immediately the Son or Grandchild; but the Father's Brother (or Siſters) ſhall be preferred before the Father himſelf; and the Grandfather's Brother (or Siſters) before the Grandfather: And yet upon a ſtrict Account, the Father is nearer of Blood to the Son than the Uncle, yea than the Brother; for the Brother is therefore of the Blood of the Brother, becauſe both derive from the ſame Parent, the Common Fountain of both their Blood. And therefore the Father at this Day is preferred in the Adminiſtration of the Goods before the Son's Brother of the whole Blood, and a Remainder limited *Proximo de Sanguine* of the Son ſhall veſt in the Father before it ſhall veſt in the Uncle. *Vide Littleton, Lib.* 1. *fo.* 8, 10.

3. Rule. *Thirdly*, That all the Deſcendants from ſuch a Perſon as by the Laws of *England*

might have been Heir to another, hold the ſame Right by Repreſentation as that Common Root from whence they are derived; and therefore,

1*ſt*, They are in Law in the ſame Right of Worthineſs and Proximity of Blood, as their Root that might have been Heir was, in caſe he had been living: And hence it is, that the Son or Grandchild, whether Son or Daughter of the eldeſt Son, ſucceeds before the younger Son; and the Son or Grandchild of the eldeſt Brother, before the youngeſt Brother; and ſo through all the Degrees of Succeſſion, by the Right of Repreſentation, the Right of Proximity is tranſferred from the Root to the Branches, and gives them the ſame Preference as the next and worthieſt of Blood.

2*dly*, This Right tranſferred by Repreſentation is infinite and unlimited in the Degrees of thoſe that deſcend from the Repreſented; for *Filius* the Son, the *Nepos* the Grandſon, the *Abnepos* the Great-Grandſon, and ſo *in infinitum* enjoy the ſame Privilege of Repreſentation as thoſe from whom they derive their Pedigree have, whether it be in Deſcents Lineal, or Tranſverſal; and therefore the Great-Grandchild of the eldeſt Brother, whether it be Son or Daughter, ſhall be preferred before the younger Brother, becauſe tho' the Female be leſs worthy than the Male, yet ſhe ſtands in Right of Repreſentation of the eldeſt Brother, who was more worthy than the younger. And upon this Account it is,

3*dly*, That

3*dly*, That if a Man have two Daughters and the eldeſt dies in the Life of the Father, leaving ſix Daughters, and then the Father dies; the youngeſt Daughter ſhall have an equal Share with the other ſix Daughters, becauſe they ſtand in Repreſentation and Stead of their Mother, who could have had but a Moiety.

4. Rule. *Fourthly*, That by the Law of *England*, without a ſpecial Cuſtom to the contrary, the eldeſt Son, or Brother, or Uncle, excludes the younger, and the Males in an equal Degree do not all inherit: But all the Daughters, whether by the ſame or divers Venters, do inherit together to the Father, and all the Siſters by the ſame Venter do inherit to the Brother.

5. Rule. *Fifthly*, That the laſt actual Seiſin in any Anceſtor, makes him, as it were, the Root of the Deſcent equally to many Intents as if he had been a Purchaſer; and therefore he that cannot, according to the Rules of Deſcents, derive his Succeſſion from him that was laſt actually ſeized, tho' he might have derived it from ſome precedent Anceſtor, ſhall not inherit. And hence it is, That where Lands deſcend to the eldeſt Son from the Father, and the Son enters and dies without Iſſue, his Siſter of the whole Blood ſhall inherit as Heir to the Brother, and not the younger Son of the half Blood, becauſe he cannot be Heir to the Brother of the half Blood; but if the eldeſt Son had ſur-

vived the Father and died before Entry, the youngeſt Son ſhould inherit as Heir to the Father, and not the Siſter, becauſe he is Heir to the Father that was laſt actually ſeized. And hence it is, That tho' the Uncle is preferred before the Father in Deſcents to the Son; yet if the Uncle enter after the Death of the Son and die without Iſſue, the Father ſhall inherit to the Uncle, *quia Seiſina facit Stipitem.*

Sixthly, That whoſoever derives a Title to any Land, muſt be of the Blood to him that firſt purchaſed it: And this is the Reaſon why, if the Son purchaſe Lands and dies without Iſſue, it ſhall deſcend to the Heirs of the Part of the Father; and if he has none, then to the Heirs on the Part of the Mother; becauſe tho' the Son has both the Blood of the Father and of the Mother in him, yet he is of the whole Blood of the Mother, and the Conſanguinity of the Mother are *Conſanguinei Cognati* of the Son. 6. Rule.

And of the other Side, if the Father had purchaſed Lands, and it had deſcended to the Son, and the Son had died without Iſſue, and without any Heir of the Part of the Father, it ſhould never have deſcended in the Line of the Mother, but eſcheated: For tho' the *Conſanguinei* of the Mother were the *Conſanguinei* of the Son, yet they were not of Conſanguinity to the Father, who was the Purchaſer; but if there had been none of the Blood of the Grandfather, yet it might

have resorted to the Line of the Grandmother, because her *Consanguinei* were as well of the Blood of the Father, as the Mother's Consanguinity is of the Blood of the Son: And consequently also, if the Grandfather had purchased Lands, and they had descended to the Father, and from him to the Son; if the Son had entred and died without Issue, his Father's Brothers or Sisters, or their Descendants, or, for want of them, his Great Grandfather's Brothers or Sisters, or their Descendants, or, for want of them, any of the Consanguinity of the Great Grandfather, or Brothers or Sisters of the Great Grandmother, or their Descendants, might have inherited, for the Consanguinity of the Great Grandmother was the Consanguinity of the Grandfather; but none of the Line of the Mother, or Grandmother, *viz.* the Grandfather's Wife, should have inherited, for that they were not of the Blood of the first Purchaser. And the same Rule *è converso* holds in Purchases in the Line of the Mother or Grandmother, they shall always keep in the same Line that the first Purchaser settled them in.

But it is not necessary, That he that inherits be always Heir to the Purchaser; it is sufficient if he be of his Blood, and Heir to him that was last seized. The Father purchases Lands which descended to the Son, who dies without Issue, they shall never descend to the Heir of the Part of the Son's Mother; but if the Son's Grandmother has a Brother, and the Son's Great Grandmother hath

hath a Brother, and there are no other Kindred, they shall descend to the Grandmother's Brother; and yet if the Father had died without Issue, his Grandmother's Brother should have been preferred before his Mother's Brother, because the former was Heir of the Part of his Father tho' a Female, and the latter was only Heir of the Part of his Mother; but where the Son is once seized and dies without Issue, his Grandmother's Brother is to him Heir of the Part of his Father, and being nearer than his Great Grandmothers Brother, is preferred in the Descent.

But *Note*, This is always intended so long as the Line of Descent is not broken; for if the Son alien those Lands, and then repurchase them again in Fee, now the Rules of Descents are to be observed as if he were the original Purchaser, and as if it had been in the Line of the Father or Mother.

Seventhly, In all Successions, as well in the *Line Descending*, *Transversal*, or *Ascending*, the Line that is first derived from a Male Root has always the Preference. 7. Rule.

Instances whereof in the *Line Descending*, &c. *viz.*

A. has Issue two Sons *B.* and *C.* *B.* has Issue a Son and a Daughter *D.* and *E.* *D.* the Son has Issue a Daughter *F.* and *E.* the Daughter has Issue a Son *G.* Neither *C.* nor any of his Descendants, shall inherit so long as there are any Descendants

from *D.* and *E.* and neither *E.* the Daughter, nor any of her Deſcendants, ſhall inherit ſo long as there are any Deſcendants from *D.* the Son, whether they be Male or Female.

So in Deſcents Collateral, as Brothers and Siſters, the ſame Inſtances applied thereto, evidence the ſame Concluſions.

But in Succeſſions in the Line Aſcending, there muſt be a fuller Explication; becauſe it is darker and more obſcure, I ſhall therefore ſet forth the whole Method of *Tranſverſal Aſcending Deſcents* under the Eight enſuing Rules, *viz.*

Rules in the Line *Aſcending.*

1. Rule. *Firſt*, If the Son purchaſes Lands in Fee-Simple and dies without Iſſue, thoſe of the Male Line aſcending, *uſque infinitum* ſhall be preferred in the Deſcent, according to their Proximity of Degree to the Son; and therefore the Father's Brothers and Siſters and their Deſcendants ſhall be preferred before the Brothers of the Grandfather and their Deſcendants; and if the Father had no Brothers nor Siſters, the Grandfather's Brothers and their Deſcendants, and for want of Brothers, his Siſters and their Deſcendants, ſhall be preferred before the Brothers of the Great Grandfather: For altho' by the Law of *England* the Father or Grandfather cannot immediately inherit to the Son, yet the Direction of the Deſcent to the *Collateral Aſcending Line*, is as much as if the Father or Grandfather had been by Law inheritable; and therefore as in caſe the

the Father had been inheritable, and ſhould have inherited to the Son before the Grandfather, and the Grandfather before the Great Grandfather, and conſequently if the Father had inherited and died without Iſſue, his eldeſt Brother and his Deſcendants ſhould have inherited before the younger Brother and his Deſcendants; and if he had no Brothers but Siſters, the Siſters and their Deſcendants ſhould have inherited before his Uncles or the Grandfather's Brothers and their Deſcendants. So though the Law of *England* excludes the Father from inheriting, yet it ſubſtitutes and directs the Deſcent as it ſhould have been, had the Father inherited, *viz.* It lets in thoſe firſt that are in the next Degree to him.

Secondly, The ſecond Rule is this: That the Line of the Part of the Mother ſhall never inherit as long as there are any, tho' never ſo remote, of the Line of the Part of the Father; and therefore, tho' the Mother has a Brother, yet if the *Atavus* or *Atavia Patris* (*i. e.* the Great-Great-Great-Grandfather, or Great-Great-Great-Grandmother of the Father) has a Brother or a Siſter, he or ſhe ſhall be preferred, and exclude the Mothers Brother though he is much nearer. 2. Rule.

Thirdly, But yet further, The Male Line of the Part of the Father aſcending, ſhall *in Æternum* exclude the Female Line of the Part of the Father aſcending; and there- 3. Rule.

fore in the Case proposed of the Son's purchasing Lands and dying without Issue, the Sister of the Father's Grandfather, or of his Great Grandfather, and so *in infinitum* shall be preferred before the Father's Mothers Brother, tho' the Father's Mothers Brother be a Male, and the Father's Grandfather or Great Grandfather's Sister be a Female, and more remote, because she is of the Male Line, which is more worthy than the Female Line, though the Female Line be also of the Blood of the Father.

4. Rule. *Fourthly*, But as in the Male Line ascending, the more near is preferred before the more remote; so in the Female Line descending, so it be of the Blood of the Father, it is preferred before the more remote. The Son therefore purchasing Lands, and dying without Issue, and the Father, Grandfather, and Great Grandfather, and so upward, all the Male Line being dead without any Brother or Sister, or any descending from them; but the Father's Mother has a Sister or Brother, and also the Father's Grandmother has a Brother, and likewise the Father's Great Grandmother has a Brother: Tho' it is true, that all these are of the Blood of the Father; and tho' the very remotest of them, shall exclude the Son's Mothers Brother; and tho' it be also true, that the Great Grandmother's Blood has passed through more Males of the Father's Blood than the Blood of the Grandmother or Mother of the Father; yet in this Case, the

the Father's Mothers Sister shall be preferred before the Father's Grandmothers Brother, or the Great Grandmothers Brother, because they are all in the Female Line, *viz. Cognati* (and not *Adgnati*), and the Father's Mothers Sister is the neareſt, and therefore shall have the Preference as well as in the Male Line ascending, the Father's Brother or his Sister shall be preferred before the Grandfather's Brother.

Fifthly, But yet in the last Case, where the Son purchases Lands and dies without Issue, and without any Heir on the Part of the Grandfather, the Lands should descend to the Grandmothers Brother or Sister, as Heir on the Part of his Father; yet if the Father had purchased this Land and died, and it descended to his Son, who died without Issue, the Lands should not have descended to the Father's Mothers Brother or Sister, for the Reasons before given in the *Third Rule*: But for want of Brothers or Sisters of the Grandfather, Great Grandfather, and so upwards in the Male ascending Line, it should descend to the Father's Grandmothers Brother or Sister which is his Heir of the Part of his Father, who should be preferred before the Father's Mothers Brother, who is in Truth the Heir of the Part of the Mother of the Purchaser, tho' the next Heir of the Part of the Father of him that last died seized; and therefore, as if the Father that was the Purchaser had died without Issue, the Heirs 5. Rule.

of the Part of the Father, whether of the Male or Female Line, ſhould have been preferred before the Heirs of the Part of the Mother; ſo the Son, who ſtands now in the Place of the Father, and inherits to him primarily, in his Father's Line dying without Iſſue, the ſame Devolution and hereditary Succeſſion ſhould have been as if his Father had immediately died without Iſſue, which ſhould have been to his Grandmothers Brother, as Heir of the Part of the Father, tho' by the Female Line, and not to his Mothers Brother, who was only Heir of the Part of his Mother, and who is not to take till the Father's Line both Male and Female be ſpent.

6. Rule. *Sixthly*, If the Son purchaſes Lands and dies without Iſſue, and it deſcends to any Heir of the Part of the Father, and then if the Line of the Father (after Entry and Poſſeſſion) fail, it ſhall never return to the Line of the Mother; tho' in the firſt Inſtance, or firſt Deſcent from the Son, it might have deſcended to the Heir of the Part of the Mother; for now by this Deſcent and Seiſin it is lodged in the Father's Line, to whom the Heir of the Part of the Mother can never derive a Title as Heir, but it ſhall rather eſcheat: But if the Heir of the Part of the Father had not entred, and then that Line had failed, it might have deſcended to the Heir of the Part of the Mother as Heir to the Son, to

to whom immediately, for want of Heirs of the Part of the Father, it might have deſcended.

Seventhly, And upon the ſame Reaſon, if it had once deſcended to the Heir of the Part of the Father of the Grandfather's Line, and that Heir had entred, it ſhould never deſcend to the Heir of the Part of the Father of the Grandmothers Line, becauſe the Line of the Grandmother was not of the Blood or Conſanguinity of the Line of the Grandmothers Side. 7. Rule.

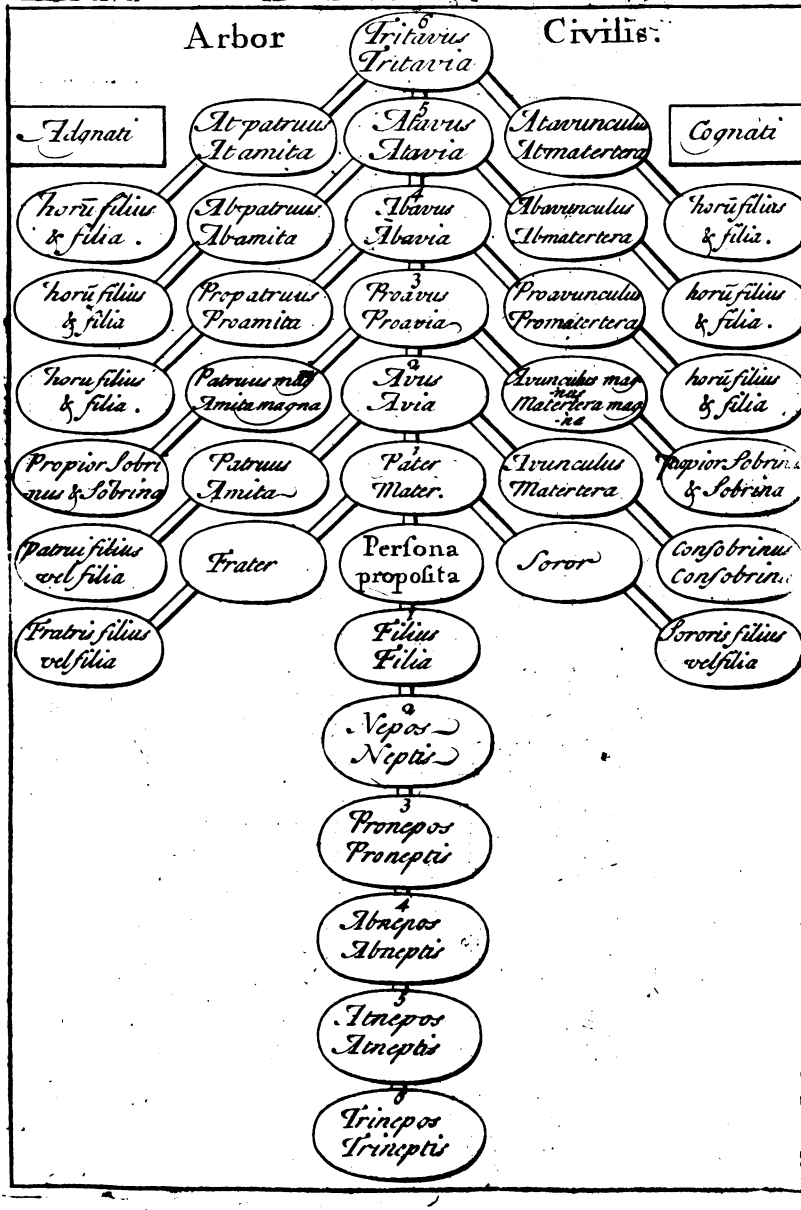
Eighthly, If for Default of Heirs of the Purchaſer of the Part of the Father, the Lands deſcend to the Line of the Mother, the Heirs of the Mother of the Part of her Father's Side, ſhall be preferred in the Succeſſion before her Heirs of the Part of her Mothers Side, becauſe they are the more worthy. 8. Rule.

And thus the Law ſtands in Point of Deſcents or Hereditary Succeſſions in *England* at this Day, and has ſo ſtood and continued for above four Hundred Years paſt, as by what has before been ſaid, may eaſily appear. And *Note*, The moſt Part of the Eight Rules and Differences above ſpecified and explained, may be collected out of the Reſolutions in the Caſe of *Clare verſus Brook, &c.* in *Plowden's Commentaries, Folio* 444.

But

But for the better illustrating and clearing of the Rules and Methods of Descents, and of the different Directions of the Civil Law, the Canon Law, and the Common Law therein; I shall here subjoin the so much famed *Arbor Civilis* of the *Civilians* and *Canonists*, which being compared with the *Gradus Parentelæ* in the *First Institutes*, will fully illustrate what has been already said.

CHAP.



CHAP. XII.

Touching Trials by Jury.

HAving in the former Chapter somewhat largely treated of the Course of Descents, I shall now with more Brevity consider that other Title of our Law which I before propounded (in order to evidence the Excellency of the Laws of *England* above those of other Nations), *viz. The Trial by a Jury of Twelve Men*; which upon all Accounts, as it is settled here in this Kingdom, seems to be the best Trial in the World: I shall therefore give a short Account of the Method and Manner of that Trial, *viz.*

1. *First*, The Writ to return a Jury, issues to the Sheriff of the County: And,

1st, He is to be a Person of Worth and Value, that so he may be responsible for any Defaults, either of himself or his Officers. And, *2dly*, *Is Sworn*, faithfully and honestly, to execute his Office. This Officer is entrusted to elect and return the Jury, which he is obliged to do in this Manner: 1. Without the Nomination of either Party. 2. They are to be such Persons as for Estate and Quality are fit to serve upon that Employment. 3. They are to be of the Neighbourhood of the Fact to be

be inquired, or at leaſt of the County or Bailywick. And, 4. Anciently Four, and now Two of them at leaſt are to be of the Hundred. *But* Note, *This is now in great Meaſure altered by Statute.*

Secondly, Touching the Number and Qualifications of the Jury. 2.

1*ſt*, As to their Number, though only Twelve are ſworn, yet Twenty four are to be returned to ſupply the Defects or Want of Appearance of thoſe that are Challenged off, or make Default. 2*dly*, Their Qualifications are many, and are generally ſet down in the Writ that ſummons them, *viz.* 1. They are to be *Probi & legales Homines.* 2. Of ſufficient Freeholds, according to ſeveral Proviſions of Acts of Parliament. 3. Not Convict of any Notorious Crime that may render them unfit for that Employment. 4. They are not to be of the Kindred or Alliance of any of the Parties. And, 5. Not to be ſuch as are prepoſſeſſed or prejudiced before they hear their Evidence.

Thirdly, The Time of their Return. 3.

Indeed, in Aſſizes, the Jury is to be ready at the Bar the firſt Day of the Return of the Writ: But in other Caſes, the Pannel is firſt returned upon the *Venire Facias*, or ought to be ſo, and the Proofs or Witneſſes are to be brought or ſummoned by *Diſtringas* or *Habeas Corpora* for their Appearance at the Trial, whereby the Parties may have Notice of the Jurors, and of their Sufficiency and Indifferency, that ſo they may make their

their Challenges upon the Appearance of the Jurors if there be just Cause.

4. *Fourthly*, The Place of their Appearance. If it be in Cases of such Weight and Consequence as by the Judgment of the Court is fit to be tried at the Bar, then their Appearance is directed to be there; but in ordinary Cases, the Place of Appearance is in the Country at the Assises, or *Nisi Prius*, in the County where the Issue to be tried arises: And certainly this is an excellent Constitution. The great Charge of Suits is the attendance of the Parties, the Jury-Men and Witnesses: And therefore tho' the Preparation of the Causes in Point of pleading to Issue, and the Judgment, is for the most part in the Courts at *Westminster*, whereby there is kept a great Order and Uniformity of Proceedings in the whole Kingdom, to prevent Multiplicity of Laws and Forms; yet those are but of small Charge, or Trouble, or Attendance, one Attorney being able to dispatch Forty Men's Business with the same Ease, and no greater Attendance than one Man would dispatch his own Business: But the great Charge and Attendance is at the Trial, which is therefore brought Home to the Parties in the Counties, and for the most part near where they live.

5. *Fifthly*, The Persons before whom they are to appear.

If the Trial be at the Bar, it is to be before that Court where the Trial is; if in the Country, then before the Justices of Assizes, or *Nisi Prius*, who are Persons well

acquainted with the Common Law, and for the moſt part are Two of thoſe Twelve ordinary Juſtices who are appointed for the Common Diſpenſation of Juſtice in the Three great Courts at *Weſtminſter*. And this certainly was a moſt wiſe Conſtitution: For,

1*ſt*, It prevents Factions and Parties in the Carriage of Buſineſs, which would ſoon appear in every Cauſe of Moment, were the Trial only before Men reſiding in the Counties, as Juſtices of the Peace, or the like, or before Men of little or no Place, Countenance or Preheminence above others; and the more to prevent Partiality in this Kind, thoſe Judges are by Law prohibited to hold their Seſſions in Counties where they were born or dwell.

2*dly*, As it prevents Factions and Part-takings, ſo it keeps both the Rule and the Adminiſtration of the Laws of the Kingdom uniform; for thoſe Men are employed as Juſtices, who as they have had a Common Education in the Study of the Law, ſo they daily in Term-time Converſe and Conſult with one another; acquaint one another with their Judgments, ſit near one another in *Weſtminſter-Hall*, whereby their Judgments and Deciſions are neceſſarily communicated to one another, either immediately or by Relations of others, and by this Means their Judgments and their Adminiſtrations of Common Juſtice carry a Conſonancy, Congruity, and Uniformity one to another, whereby both the Laws and the Adminiſtrations thereof are preſerved from that Con-

Confusion and Disparity that would unavoidably ensue, if the Administration was by several incommunicating Hands, or by provincial Establishments: And besides all this, all those Judges are solemnly sworn to observe and judge according to the Laws of the Kingdom, according to the best of their Knowledge and Understanding.

6. *Sixthly*, When the Jurors appear, and are called, each Party has Liberty to take his Challenge to the Array it self, if unduly or partially made by the Sheriff; or if the Sheriff be of Kin to either Party, or to the Polls, either for Insufficiency of Freehold, or Kindred or Alliance to the other Party, or such other Challenges, either Principal, or to the Favour, as renders the Juror unfit and incompetent to try the Cause, and the Challenge being confess'd or found true by some of the rest of the Jury, that particular incompetent Person is withdrawn.

7. *Seventhly*, Then Twelve, and no less, of such as are indifferent and are return'd upon the Principal Pannel, or the Tales, are sworn to try the same according to their Evidence.

8. *Eighthly*, Being thus sworn, the Evidence on either Part is given in upon the Oath of Witnesses, or other Evidence by Law allowed, (as Records and ancient Deeds, but later Deeds and Copies of Records must be attested by the Oaths of Witnesses) and other Evidence in the open Court, and in the Presence of the Parties, their Attornies, Council, and all By-standers, and before

the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witneſſes, which Exceptions are publickly ſtated, and by the Judges openly and publickly allowed or diſallowed, wherein if the Judge be partial, his Partiality and Injuſtice will be evident to all By-ſtanders; and if in his Direction or Deciſion he miſtake the Law, either through Partiality, Ignorance, or Inadvertency, either Party may require him to ſeal a Bill of Exception, thereby to deduce the Error of the Judge (if any were) to a due Ratification or Reverſal by Writ of Error. Bills of Exception.

Ninthly, The Excellency of this open Courſe of Evidence to the Jury in Preſence of the Judge, Jury, Parties and Council, and even of the adverſe Witneſſes, appears in theſe Particulars: 9. Excellency of his Trial.

1*ſt*, That it is openly; and not in private before a Commiſſioner or Two, and a couple of Clerks, where oftentimes Witneſſes will deliver that which they will be aſhamed to teſtifie publickly.

2*dly*, That it is *Ore Tenus* perſonally; and not in Writing, wherein oftentimes, yea too often, a crafty Clerk, Commiſſioner, or Examiner, will make a Witneſs ſpeak what he truly never meant, by his dreſſing of it up in his own Terms, Phraſes, and Expreſſions; whereas on the other Hand, many times the very Manner of a Witneſs's delivering his Teſtimony will give a probable

Indication whether he ſpeaks truly or falſly; and by this Means alſo he has Opportunity to correct, amend, or explain his Teſtimony upon further Queſtioning with him, which he can never have after a Depoſition is ſet down in Writing.

3*dly*, That by this Courſe of perſonal and open Examination, there is Opportunity for all Perſons concern'd, *viz.* The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occaſional Queſtions, which beats and bolts out the Truth much better than when the Witneſs only delivers a formal Series of his Knowledge without being interrogated; and on the other Side, preparatory limited, and formal Interrogatories in Writing, preclude this Way of occaſional Interrogations, and the beſt Method of ſearching and ſifting out the Truth is choak'd and ſuppreſs'd.

4*thly*, Alſo by this perſonal Appearance and Teſtimony of Witneſſes, there is Opportunity of confronting the adverſe Witneſſes, of obſerving the Contradiction of Witneſſes ſometimes of the ſame Side, and by this Means great Opportunities are gained for the true and clear Diſcovery of the Truth.

5*thly*, And further, The very Quality, Carriage, Age, Condition, Education, and Place of Commorance of Witneſſes, is by this Means plainly and evidently ſet forth to the Court and the Jury, whereby the Judge and Jurors may have a full Information of them, and the Jurors as they ſee Cauſe may give

give the more or leſs Credit to their Teſtimony, for the Jurors are not only Judges of the Fact, but many times of the Truth of Evidence; and if there be juſt Cauſe to disbelieve what a Witneſs ſwears, they are not bound to give their Verdict according to the Evidence or Teſtimony of that Witneſs; and they may ſometimes give Credit to one Witneſs, tho' oppos'd by more than one. And indeed, it is one of the Excellencies of this Trial above the Trial by Witneſſes, that altho' the Jury ought to give a great Regard to Witneſſes and their Teſtimony, yet they are not always bound by it, but may either upon reaſonable Circumſtances, inducing a Blemiſh upon their Credibility, tho' otherwiſe in themſelves in Strictneſs of Law they are to be heard, pronounce a Verdict contrary to ſuch Teſtimonies, the Truth whereof they have juſt Cauſe to ſuſpect, and may and do often pronounce their Verdict upon one ſingle Teſtimony, which Thing the Civil Law admits not of. *Vide prox. Pag.*

Tenthly, Another Excellency of this Trial is this; That the Judge is always preſent at the Time of the Evidence given in it: Herein he is able in Matters of Law emerging upon the Evidence to direct them; and alſo, in Matters of Fact, to give them a great Light and Aſſiſtance by his weighing the Evidence before them, and obſerving where the Queſtion and Knot of the Buſineſs lies, and by ſhewing them his Opinion even in Matter of Fact, which is a great 10.

Advantage and Light to Lay-Men: And thus, as the Jury aſſiſts the Judge in determining the Matter of Fact, ſo the Judge aſſiſts the Jury in determining Points of Law, and alſo very much in inveſtigating and enlightening the Matter of Fact, whereof the Jury are Judges.

11. *Eleventhly*, When the Evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up, and from receiving any Evidence other than in open Court, where it may be ſearch'd into, diſcuſs'd and examin'd. In this Receſs of the Jury they are to conſider their Evidence, and if any Writings under Seal were given in Evidence, they are to have them with them; they are to weigh the Credibility of Witneſſes, and the Force and Efficacy of their Teſtimonies, wherein (as I before ſaid) they are not preciſely bound to the Rules of the Civil Law, *viz.* To have Two Witneſſes to prove every Fact, unleſs it be in Caſes of Treaſon, nor to reject one Witneſs becauſe he is ſingle, or always to believe Two Witneſſes if the Probability of the Fact does upon other Circumſtances reaſonably encounter them; for the Trial is not here ſimply by Witneſſes, but by Jury; nay, it may ſo fall out, that the Jury upon their own Knowledge may know a Thing to be falſe that a Witneſs ſwore to be true, or may know a Witneſs to be incompetent or incredible, tho' nothing

In Treaſon, Two Witneſſes.

thing be objected againſt him, and may give their Verdict accordingly.

Twelfthly, When the whole Twelve Men are agreed, then, and not till then, is their Verdict to be received; and therefore the Majority of Aſſentors does not conclude the Minority, as is done in ſome Countries where Trials by Jury are admitted: But if any One of the Twelve diſſent, it is no Verdict, nor ought to be received. It is true, That in ancient Times, as *Hen.* II. and *Hen.* III.'s Time, yea, and by *Fleta* in the Beginning of *Edw.* I.'s Time, if the Jurors diſſented, ſometimes there was added a Number equal to the greater Party, and they were then to give up their Verdict by Twelve of the old Jurors, and the Jurors ſo added; but this Method has been long Time antiquated, notwithſtanding the Practice in *Bracton*'s Time, *Lib.* 4. *cap.* 9. and *Fleta*, *lib.* 4. *cap.* 9. for at this Day the entire Number firſt empannell'd and ſworn are to give up an unanimous Verdict, otherwiſe it is none. And indeed this gives a great Weight, Value and Credit to ſuch a Verdict, wherein Twelve Men muſt unanimouſly agree in a Matter of Fact, and none diſſent; though it muſt be agreed, that an ignorant Parcel of Men are ſometimes governed by a few that are more Knowing, or of greater Intereſt or Reputation than the reſt. 12. Verdict unanimous.

Thirteenthly, But if there be Matter of Law that carries in it any Difficulty, the Jury may, to deliver themſelves from the Danger of an Attaint, find it ſpecially, that ſo it may be 13. Special Verdict.

be decided in that Court where the Verdict is returnable; and if the Judge over-rule the Point of Law contrary to Law, whereby the Jury are perſwaded to find a general Verdict (which yet they are not bound to do if they doubt it), then the Judge, upon the Requeſt of the Party deſiring it, is bound by Law in convenient Time to ſeal a Bill of Exceptions, containing the whole Matter excepted to; that ſo the Party grieved, by ſuch Indiſcretion or Error of the Judge, may have Relief by Writ of Error on the Statute of *Weſtminſter* 2.

Bill of Exceptions.

14. *Fourteenthly*, Altho' upon general Verdicts given at the Bar in the Courts at *Weſtminſter*, the Judgment is given within Four Days, in Preſumption that there cannot be any conſiderable Surprize in ſo ſolemn a Trial, or at leaſt it may be ſoon eſpied; yet upon Trials by *Niſi prius* in the Country, the Judgment is not given preſently by the Judge of *Niſi prius*, unleſs in Caſes of *Quare Impedit*: But the Verdict is returned after Trial into that Court from whence the Cauſe iſſued, that thereby, if any Surprize happened either through much Buſineſs of the Court, or through Inadvertency of the Attorney or Council, or through any Miſcarriage of the Jury, or through any other Caſualty, the Party may have his Redreſs in that Court from whence the Record iſſued.

Judgment.

And thus ſtands this excellent Order of Trial by Jury, which is far beyond the Trial by Witneſſes according to the Proceedings

ceedings of the Civil Law, and of the Courts of Equity, both for the Certainty, the Diſpatch, and the Cheapneſs thereof: It has all the Helps to inveſtigate the Truth that the Civil Law has, and many more. For, as to Certainty,

1*ſt*, It has the Teſtimony of Witneſſes, as well as the Civil Law and Equity Courts.

2*dly*, It has this Teſtimony in a much more advantageous Way than thoſe Courts for diſcovery of Truth.

3*dly*, It has the Advantage of the Judge's Obſervation, Attention, and Aſſiſtance, in Point of Law by way of Deciſion, and in Point of Fact by way of Direction to the Jury.

4*thly*, It has the Advantage of the Jury, and of their being *de Viceneto*, who oftentimes know the Witneſſes and the Parties: And,

5*thly*, It has the unanimous Suffrage and Opinion of Twelve Men, which carries in it ſelf a much greater Weight and Preponderation to diſcover the Truth of a Fact than any other Trial whatſoever.

And as this Method is more certain, ſo it is much more expeditious and cheap; for oftentimes the Seſſion of one Commiſſion for the Examination of Witneſſes for one Cauſe in the Eccleſiaſtical Courts, or Courts of Equity, laſts as long as a whole Seſſion of *Niſi prius*, where a Hundred Cauſes are examined and tried.

And thus much concerning Trials in Civil Causes. As for Trials in Causes Criminal, they have this further Advantage, That regularly the Accusation as Preparatory to the Trial is by a Grand Jury: So that as no Man's Interest, according to the Course of the Common Law, is to be tried or determined without the Oaths of a Jury of Twelve Men; so no Man's Life is to be tried but by the Oaths of Twelve Men, and by the Preparatory Accusation or Indictment by Twelve Men or more precedent to his Trial, unless it be in the Case of an Appeal at the Suit of the Party.

I might here shew the Antiquity of this Method of Trial, both from the *Saxon* and the *British* Laws, and demonstrate it to have been in Use long before the Time of *William* I. and indeed it seems to have been one of the first Principles upon which our Constitution was erected and established.

Sed de hic Satis.

THE

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